03-6597 (16)

Supreme Court, U.S.
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No. 03-_____

IN THE

SUPREME COURT OF THE UNITED STATES

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YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as next friend of Yaser Esam Hamdi,
*Petitioners*,

v.

DONALD RUMSFELD; W. R. PAULETTE, Commander,
*Respondents*.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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FRANK W. DUNHAM, JR.
Federal Public Defender
Eastern District of Virginia
Counsel of Record
GEREMY C. KAMENS
Assistant Federal Public Defender
Office of the Federal Public Defender
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

(9)

## QUESTIONS PRESENTED

1. Does the Constitution permit Executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the Executive to be an "enemy combatant"?

2. Is the indefinite detention of an American citizen seized abroad but held in the United States solely on the assertion of Executive officials that he is an "enemy combatant" permissible under applicable congressional statutes and treaty provisions?

3. In a habeas corpus proceeding challenging the indefinite detention of an American citizen seized abroad, detained in the United States, and declared by Executive officials to be an "enemy combatant," does the separation of powers doctrine preclude a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the Executive branch's asserted justification of the detention?



## LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the Fourth Circuit:

Yaser Esam Hamdi and Esam Fouad Hamdi, as next friend, were the appellees below. Donald Rumsfeld, United States Secretary of Defense, and W.R. Paulette, Commander of the Norfolk Naval Brig, were appellants below.

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YASER ESAM HAMDI; ESAM FOUAD HAMDI,
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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a-28a) is reported at 316 F.3d 450 (4th Cir. 2003). The opinion of the district court (App. 29a-38a) is reported at 243 F. Supp. 2d 527 (E.D. Va. 2002). The denial of the petition for rehearing (App. 39a-67a) is reported at 337 F.3d 335 (4th Cir. 2003).



Earlier opinions in this proceeding are reported at 296 F.3d 278 (4th Cir. 2002), and 294 F.3d 598 (4th Cir. 2002).

## JURISDICTION

The Court of Appeals' judgment was entered on January 8, 2003. By a vote of eight to four, the full court denied a petition for rehearing on July 9, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Suspension Clause of Section 9, Clause 2 of Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. Section 8, Clause 11 of Article I provides that Congress possesses the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

3. Section 2, Clause 1 of Article II provides in pertinent part: "The President shall be Commander in Chief of the Army and Navy of the United States . . . ."

4. The Fifth Amendment to the Constitution provides in pertinent part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

5. 18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

6. 28 U.S.C. § 2241 provides for the issuance of the writ of habeas corpus if a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States."

7. 28 U.S.C. § 2243 authorizes habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material facts," and provides that courts "shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

8. 28 U.S.C. § 2246 provides that "[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition . . . ."

## STATEMENT OF THE CASE

This case involves the indefinite and virtually incommunicado[1] detention of an American citizen, Yaser Esam Hamdi ("Petitioner" or "Hamdi"), by the military based on its assertion that he is an "enemy combatant"—a soldier affiliated with the Taliban, the former government of Afghanistan. To date, Hamdi has been detained for almost two years without access to counsel or to any court, military or civilian. Since April 2002, he has been held in a U.S. Navy jail in the United States.[2]

The Court of Appeals for the Fourth Circuit ruled that the military's indefinite detention of Hamdi was not only lawful but also virtually immune from factual inquiry by the judiciary, in large measure because of the location—"a zone of active combat" in Afghanistan—where Hamdi was purportedly seized. By a vote of eight to four, and over dissenting opinions of Judges Luttig and Motz, the *en banc* court declined to rehear this decision.

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[1] Hamdi has been forbidden any contact with the outside world with the exception of a visit by a representative of the International Red Cross and the delivery of infrequent letters to his family.

[2] Recent news reports suggest that Hamdi has been moved from a Navy brig in Norfolk, Virginia, to a brig located in Charleston, South Carolina. *U.S. Man Caught With Taliban Is Moved to Brig*, L.A. Times, Aug. 24, 2003, at 16; *cf.* Fed. R. App. P. 23(a); Sup. Ct. R. 36(1).



This case presents fundamental questions about the right of American citizens to be free from indefinite detention by the government without charge or trial, the power of the Executive branch to abbreviate due process of law during wartime, and the role of the federal courts in resolving these issues. The appropriate balance between the rights of citizens and the Executive power to defend against threats to national security is an old question, *see, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), and one that was answered by the Fourth Circuit in a fundamentally alarming way.

By refusing to permit judicial review of the facts related to the seizure of an American citizen, the lower court not only embraced an unchecked Executive power to indefinitely detain American citizens suspected of being affiliated with enemies, but it also abandoned procedural safeguards designed to promote truth and fairness. *Cf. Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("This system is premised on the well-tested principle that truth — as well as fairness — is 'best discovered by powerful statements on both sides of the question.'") (quoting *United States v. Cronic*, 466 U.S. 648, 655 (1984)). Once the Executive branch asserts that a person is an enemy combatant, the Fourth Circuit ruled, no factual testing of that determination is allowed.

The Fourth Circuit's opinion cannot be squared with this Court's rulings regarding the scope of judicial review of military seizures and the rights of detainees

to obtain access to the courts. Nor is the Fourth Circuit's ruling consonant with constitutional and congressional prohibitions against the unbridled detention of citizens by the Executive branch. For these important reasons, this Court should accept review of Petitioner's case.

## I. Factual Background

Petitioner is an American citizen who resided in Afghanistan in the Fall of 2001. Petitioner was apparently seized by Northern Alliance forces and turned over to the U.S. military during that time, and has been in U.S. custody ever since—a period fast approaching two years. From April 2002 until recently, Hamdi was imprisoned in a naval brig in Norfolk, Virginia. Counsel has not been permitted access to Petitioner, and Petitioner has not been permitted to appear in court or otherwise participate in these proceedings. Petitioner may not even be aware of the existence of the litigation bearing his name.

In support of Petitioner's detention, the government submitted a two-page, nine-paragraph declaration by Michael Mobbs, a special advisor to the Under Secretary of Defense for Policy. (J.A. 61.)[3] Mobbs asserts that Petitioner traveled to Afghanistan in July or August of 2001.[4] Mobbs further asserts that Petitioner

[3] Citations to "(J.A.)" refer to the Joint Appendix in the Court of Appeals. Citations to "(App.)" refer to the appendices attached to this petition.

[4] The Mobbs declaration is based entirely on hearsay. Mobbs has no first-hand knowledge of any of the facts contained in the declaration. (J.A. 61, ¶ 2.)



"affiliated" with a Taliban military unit prior to the September 11 attacks on the United States. Petitioner allegedly remained with that unit after the September 11 attacks and after October 7, 2001, when the United States began military operations against the Taliban. (J.A. 61, ¶ 3.)

Mobbs alleges that on an unspecified date in late 2001, Northern Alliance forces were engaged in battle with the Taliban. Mobbs also asserts that Petitioner possessed a rifle and that the unit with which he was affiliated surrendered to Northern Alliance forces. Mobbs does not say where or when this occurred or what Petitioner was doing at the time of his capture.

While under the control of Northern Alliance forces, Petitioner was interviewed by a U.S. interrogation team. (J.A. 61, ¶ 5.) According to Mobbs, Petitioner identified himself to the U.S. interrogation team "as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban." *Id.* Mobbs does not assert that Petitioner was a member of al-Qaeda.

The Mobbs declaration then says that U.S. military screening teams determined that Petitioner met the criteria for enemy combatants over whom the U.S. was taking control, and that he also met the criteria for transfer to Guantanamo Bay, Cuba. (J.A. 62, ¶¶ 7, 8.) Mobbs does not set forth what those criteria were or explain why Hamdi met them. The declaration finally asserts that a "subsequent interview of Hamdi

confirmed that he surrendered and gave his firearm to Northern Alliance Forces which supports his classification as an enemy combatant."

## II. Proceedings Below

### A. Initial Proceedings in the District Court

This litigation began on May 10, 2002, when the Federal Public Defender, endeavoring to act as next friend, filed a habeas corpus petition pursuant to 28 U.S.C. § 2241 challenging Defense Secretary Donald Rumsfeld and Commander W.R. Paulette's ("Respondents") detention of Yaser Esam Hamdi. *Hamdi v. Rumsfeld*, 294 F.3d 598, 601 (4th Cir. 2002) (*Hamdi I*).[5] After several hearings, the district court ordered Respondents to permit counsel to have access to Petitioner.[6]

### B. Interlocutory Appeals Related to "Next Friend" Standing and Access to Counsel

Respondents immediately appealed the access order to the Fourth Circuit, which entered a stay on May 31, 2002. *Hamdi I*, 294 F.3d at 602. On June 26, 2003, the court dismissed the petition in *Hamdi I*, holding that the Federal Public Defender

[5] All of the lower courts that have considered this case have appointed the Federal Public Defender to represent Hamdi. The Federal Public Defender initially believed that Hamdi, like John Walker Lindh, had been brought to the United States for prosecution. *See United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

[6] A federal magistrate judge first ordered Respondents to grant counsel's request for access to Hamdi. (J.A. 202.) Respondents then appealed the magistrate judge's access order to the district court. After another full hearing on the issue of access (J.A. 207-56), the district court likewise ordered Respondents to provide counsel immediate access to Hamdi. (J.A. 257.)



did not have a significant prior relationship with Hamdi so as to qualify as a "next friend." 294 F.3d at 603-07.

On June 11, 2002, while the appeal in *Hamdi I* remained pending, a separate habeas petition was filed by Hamdi's father acting as next friend, *id.* at 600 n.1, and the district court consolidated that petition with the petition in *Hamdi I*. (J.A. 30-33.) Two full hearings having already been held on the issue of counsel's access to Hamdi in *Hamdi I*, the district court, without further hearing, again ordered Respondents to allow counsel to have access to Hamdi. *Id.*

Respondents appealed this order, and obtained a second stay from the Fourth Circuit. (J.A. 3, 148.) The Fourth Circuit then reversed, finding that the district court ordered access to Hamdi "without adequately considering [its] implications . . . and before allowing the United States to respond [to the newly filed petition by Hamdi's father]." *Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) (*Hamdi II*). The court remanded the case to the district court and directed it to design appropriate procedures that would govern the inquiry into the propriety of Hamdi's detention. *Id.* at 283-84. In a subsequent order dissolving the stay and directing the immediate issuance of the mandate, however, the Court of Appeals instructed the district court that the sufficiency of the Mobbs declaration must be considered first as "an independent matter" before the district court considered any other questions in the case. (J.A. 149.)

### C. Ruling on the Sufficiency of the Mobbs Declaration and Subsequent Interlocutory Appeal

On August 13, 2002, in accordance with the Fourth Circuit's instruction, the district court conducted a hearing to consider whether the Mobbs declaration, "standing alone," provided a sufficient factual basis for purposes of meaningful judicial review. (J.A. 326-27.)[7] On August 16, 2002, the district court issued an order finding that the Mobbs declaration, by itself, did not permit meaningful judicial review of Petitioner's detention. (App. 29a-38a.) The district court arrived at this conclusion at least in part because information in the declaration was drawn from hearsay supplied by the Northern Alliance, a loose coalition led by what the court characterized as feudal "warlords." (J.A. 390, 394); (App. 36a.)[8] Instead of ordering access to Petitioner, however, the district court thereafter ordered production of additional documentary information. (App. 38a.) Respondents obtained certification

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[7] At the hearing, the district court exhibited extraordinary deference to the Executive by offering to allow Respondents to conduct a military tribunal to determine Hamdi's status as a detainee in accordance with applicable military regulations for treatment of prisoners. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997) ("EPW Regulations") (J.A. 91-126). Respondents rejected this invitation. (J.A. 405-06.)

[8] The district court's concern in this regard was well-founded. *See* Jan McGirk, *Fighting Terror*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and $20,000 for a[n] [al] Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess.").



of that order and the Fourth Circuit panel authorized interlocutory review pursuant to 28 U.S.C. § 1292(b).

On January 8, 2003, the Fourth Circuit panel reversed the district court's August 16, 2002, order, and ruled not only that the Mobbs declaration was sufficient, without more, to sustain Hamdi's detention, but also that Hamdi's petition should be dismissed. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (*Hamdi III*) (App. 1a-28a.) Specifically, the panel found that "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution." (App. 10a.) In short, the Fourth Circuit ruled that when the Executive branch asserts that it has seized an American citizen in a zone of active combat and also asserts that the citizen is an enemy combatant, that citizen may not challenge or otherwise dispute those assertions. In fact, the citizen may be indefinitely incarcerated even though the assertions were made by an official who has no personal knowledge of the underlying facts.

Petitioner sought rehearing and rehearing en banc. By eight to four, and over dissenting opinions of Judges Luttig and Motz, the court denied rehearing. *See Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003) (*Hamdi IV*) (App. 39a-67a.) Judge Luttig would have granted rehearing because the panel erroneously characterized the

location of Hamdi's seizure as "undisputed" and then relied upon that fact as critical to its decision. (App. 54a (Luttig, J., dissenting from denial of rehearing).) Circumstances related to Hamdi's seizure, Judge Luttig explained, cannot be characterized as "conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." (*Id.*)

Agreeing with Judge Luttig that the panel's characterization "collapses entirely upon examination," (App. 63a), Judge Motz also reasoned that the panel permitted "appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of individual freedoms guaranteed all citizens." (App. 61a (Motz, J., dissenting from denial of rehearing).) The Fourth Circuit's ruling, Judge Motz observed, "marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation." (App. 62a.) "Neither the Constitution nor controlling precedent," Judge Motz wrote, "sanction this holding." (*Id.*)

## REASONS FOR GRANTING THE PETITION

This case presents the question whether the Executive branch may indefinitely detain an American citizen purportedly seized in a zone of armed combat and



declared to be an "enemy combatant" without providing any opportunity for the citizen to meet with counsel, challenge the military's allegations, or otherwise be heard in a federal habeas corpus proceeding. Petitioner seeks review because the judgment below: (1) involves issues of fundamental national importance; (2) conflicts with this Court's decisions authorizing judicial review of military seizures during wartime and protecting the right of detainees to court access; and (3) works a radical change in the balance between the three branches of government by condoning an open-ended Executive power to imprison American citizens at the expense of constitutionally protected liberties and congressional authority.

"The power of the executive to cast a man into prison without formulating any charge known to the law and particularly to deny him the judgment of his peers," Winston Churchill said, "is in the highest degree odious, and is the foundation of all totalitarian government . . . ." A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 Loy. L. Rev. 629, 631 (1996). In fact, the Court of Appeals' recognition of a novel Executive power to indefinitely detain American citizens and disregard fundamental constitutional rights based almost entirely upon the purported location of seizure is flatly contrary to this Court's decisions upholding the rights of citizens against military authority even in areas of alleged armed conflict. Moreover, the Fourth Circuit's ruling violates the Suspension Clause and fails to protect the basic elements

of process due under the Fifth Amendment to the Constitution. Finally, Congress has prohibited the indefinite detention of an American citizen in the absence of explicit statutory authority. For these reasons, it is profoundly important for this Court to resolve the questions posed by Hamdi's case.[9]

## I. This Case Presents Issues of Fundamental Importance

At stake is the indefinite detention of an American citizen held by the military without charge for almost two years. As Judge Luttig noted, however, this case "has implications beyond the particular dispute." (App 54a.) The lawfulness of Hamdi's indefinite imprisonment turns on "the boundaries between military and civilian power," *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946), and presents questions

[9] A petition for habeas corpus filed by another American citizen designated as an "enemy combatant," Jose Padilla, is pending review in the Court of Appeals for the Second Circuit. No. 03-2235(L). Because the Executive branch has imprisoned Mr. Padilla in South Carolina, it contends that jurisdiction is not proper in the Second Circuit. *See Padilla v. Rumsfeld*, 256 F. Supp. 2d 218, 222 (S.D.N.Y. 2003) (granting application for certification under 28 U.S.C. § 1292(b)). Oral argument apparently will take place the week of November 17, 2003.

The government evidently has erected a special facility designed to hold citizens designated as "enemy combatants" in South Carolina. Jess Bravin, *More Terror Suspects May Sit in Limbo*, Wall St. J., Aug. 8, 2002, at A4 (J.A. 320-22). Consequently, apart from the *Padilla* case pending in the Second Circuit, the questions raised by this case may never be addressed by another court of appeals. *See, e.g, Al-Marri v. Bush*, No. 03-1220, 2003 WL 21789542, at *7 (C.D. Ill. Aug. 1, 2003) (dismissing for lack of venue habeas petition filed on behalf of person declared "enemy combatant" after criminal charges were dismissed and petitioner was moved to South Carolina). Like Padilla and al-Marri, Hamdi reportedly has been moved to the same facility in South Carolina. *See supra* note 2.



integral to our constitutional design rarely equaled in national importance. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-19 (1866) ("No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people."). It is not surprising, then, that judges of the Fourth Circuit described this case as "momentous," (App. 48a (Traxler, J., concurring in denial of rehearing)), acknowledged the"overarching importance" of the issues of law, (App. 60a (Luttig, J.)), and characterized the ruling below as "breathtaking," "unprecedented," "extraordinary," and "chilling." (App. 63a, 64a (Motz, J.)).[10]

The upshot of the Fourth Circuit's ruling is that the separation of powers precludes substantial judicial inquiry into the indefinite detention of a citizen asserted to be an "enemy combatant" by the Executive branch and allegedly seized within an area asserted to be a "zone of active combat." What constitutes a "zone of active combat," and who may be designated as an "enemy combatant," were left by the Fourth Circuit to the discretion of the Executive branch. Indeed, the appellate court not only left both terms undefined, it also refused to allow Petitioner a voice as to

[10] The indefinite detention of so-called "enemy combatants" also has generated an expanding volume of commentary. *See, e.g., U.S. Nationals Detained as Unlawful Combatants*, 97 Am. J. Int'l L. 196 (2003); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L. Jrnl. 503 (2003); Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 Yale L.J. 961 (2003).

where he was seized or what he was doing at the time. The Fourth Circuit thus imposed virtually no restriction on the Executive branch's power to indefinitely imprison citizens without charge and without access to counsel or the courts.

1. According to the Fourth Circuit, "[a]ny evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant" would violate the separation of powers. (App. 25a.) For this reason, the judicial review endorsed by the Fourth Circuit "actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated [Hamdi] as an enemy combatant." (App. 55a (Luttig, J.).) The Fourth Circuit's refusal to engage in this inquiry is, as both Judge Luttig and Judge Motz recognized, irreconcilable with its promise to provide "meaningful judicial review." (App. 55a (Luttig, J.), 65a (Motz, J.).)

More ominously, Judge Motz perceptively warned that an Executive power to designate citizens as "enemy combatants" that is unhinged from judicial review "threatens the freedoms we all cherish." (App. 67a.) Because the Fourth Circuit's opinion denies any ground for judicial inquiry into the Executive's designation of a citizen as an enemy combatant, Judge Motz explained, the decision sanctions indefinite detention on the basis of "no credible evidence supporting the Executive's designation [of a citizen] as an enemy combatant." (App. 65a.)

2. The significance ascribed by the Fourth Circuit to the purported location of Hamdi's seizure offers little protection against the exercise of this unchecked power.



As the Fourth Circuit put it, the "political branches are best positioned to comprehend this global war in its full context, . . . and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches." (App. 15a.) Accordingly, as Judge Motz pointed out and Judge Traxler conceded, the Fourth Circuit's opinion suggests that the definition of a "zone of active combat" is effectively non-justiciable. (App. 64a n.3 (Motz, J.), 50a (Traxler, J.).)

Left to the Executive branch, the outlines of a "zone of active combat" in the "war on terrorism" are without limit. Indeed, the Executive branch has never been conservative about designating territory to be within the theater of armed conflict. *Cf. Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 239, 274-76 (1960) (military bases in foreign countries); *Duncan*, 327 U.S. at 311 (Territory of Hawaii); *Korematsu v. United States*, 323 U.S. 214, 220, 223 (1944) (western United States); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 126 (Indiana). And the present "war on terrorism," to be sure, is even less constrained than prior conflicts by national borders or traditional definitions of combat.[11] Moreover, outside the context of military

[11] "The war on terrorism is a global campaign against a global adversary . . . . The war on terrorism began in Afghanistan . . . but it will not end there. It will not end until terrorist networks have been rooted out, wherever they exist." *Prepared Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan*, Washington, D.C., July 31, 2002, *at* http://www.defenselink.mil/speeches/2002/s20020731-secdef.html.

operations, and within the United States, the Executive branch has employed the threat of "enemy combatant" designation to secure guilty pleas in criminal cases. *See, e.g.*, Michael Powell, *No Choice but Guilty; Lackawanna Case Highlights Legal Tilt*, Wash. Post, July 29, 2003, at A01; Eric Lichtblau, *Threats and Responses*, N.Y. Times, June 20, 2003, at A1.

3. The Fourth Circuit also refused to permit Petitioner to speak to counsel with regard to the location of his seizure, much less to any other issue. Petitioner therefore "has never been given the opportunity to dispute any facts," (App. 63a (Motz, J.)), including the Executive branch's assertion that he was seized within a zone of active combat. Because the Fourth Circuit allowed the Executive branch to define what constitutes a "zone of active combat" and denied Petitioner the right to challenge whether or not he was seized within it, the appellate court's geographic limiting principle is, as Judge Motz noted, "in truth a chimera." (App. 64a.)

4. Read narrowly, as Judge Luttig and Judge Motz point out, the Fourth Circuit's ruling exposes any number of American citizens abroad—from embedded journalists to humanitarian aid workers to "unwitting tourists"—to indefinite incommunicado detention based on the thinnest of factual grounds. (App. 55a (Luttig, J.), 64a (Motz, J.).) Any citizen, in fact, that the Executive branch decides to label as "hostile" and "arrayed against our troops," (App. 18a), "could be imprisoned indefinitely without being charged with a crime or afforded legal counsel,



if the Executive asserted that the area [in which they were seized] was a zone of active combat." (App. 64a (Motz, J.).)

Read more broadly, the "zone of active combat" that defines the range of the Fourth Circuit's extraordinary refusal to inquire into a citizen's indefinite detention - is not confined by any readily cognizable boundaries of place, time, or circumstances.[12] It permits, as Judge Luttig observed, "superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant." (App 58a.) If not reversed, the Fourth Circuit's opinion may "have opened the door to the indefinite detention, without

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[12] As the Fourth Circuit noted, the Executive branch's authority to detain combatants exists only "during the duration of hostilities." (App.14a.) However, because the government represented "that American troops are still on the ground," the Fourth Circuit concluded that the armed conflict remained ongoing and rejected Petitioner's argument that the duration of the conflict must be determined by public pronouncements made by the political branches. (App.27a.) *Cf. Baker v. Carr*, 369 U.S. 186, 212 (1962) (courts empowered to construe public statements by political branches to determine end date of armed conflict); *Lincoln v. United States*, 197 U.S. 419, 429 (1905) (holding taxes collected on goods exported to Philippines and imposed pursuant to war power invalid after peace treaty notwithstanding ongoing insurrection); *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871) (looking to "public act[s]" of the political departments to ascertain the beginning and end dates of the Civil War).

By making its own factual determination as to the duration of the conflict instead of relying on the public statements of the political branches as required by this Court's precedents, the Fourth Circuit eliminated any clear limitation on the duration of Hamdi's detention. Furthermore, as Judge Motz observed, the court blurred the distinction between Afghanistan and any other "part of the world where American troops are present—e.g., the former Yugoslavia, the Philippines, or Korea," with regard to the definition of a "zone of active combat." (App. 64a.)

access to a lawyer or the courts, of any American citizen, even one captured on American soil." (App. 65a n.5 (Motz, J.).) The Fourth Circuit's ruling, in sum, is little different from the "sweeping" proposition initially rejected by the same court: "that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II*, 296 F.3d at 283. It is essential that this Court grant certiorari to address the nationally important issues raised by Petitioner's case.

## II. The Court of Appeals' Ruling Conflicts with Decisions of this Court

### A. Review Is Warranted Because the Ruling Conflicts with This Court's Opinions on the Power of Article III Courts to Examine Executive Detentions by Means of Habeas Corpus

The Fourth Circuit's holding that the separation of powers precludes the judiciary from engaging in any factual inquiry into military seizures alleged to take place within a zone of active combat, (App. 23a), is an invention out of whole cloth. It also directly conflicts with *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), and a line of other decisions establishing that the factual circumstances related to Executive seizures during wartime are subject to judicial review. Most importantly, however, the Fourth Circuit's opinion is inconsistent with cornerstone principles of our Republic, dating from well before the American Revolution, that evolved in resistence to the exercise of unchecked Executive power.

1. "At its historical core, the writ of habeas corpus has served as a means of



reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *accord Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Indeed, the unbridled power of the Executive to detain citizens by fiat was repudiated in England and its colonies, and replaced by the guarantee of independent judicial inquiry by means of the writ of habeas corpus. *See* 3 William Blackstone, Commentaries *129-38. In the aftermath of the reign of Oliver Cromwell, for example, the English Parliament passed the Habeas Corpus Act of 1641 authorizing the issuance of the writ of habeas corpus in favor of those imprisoned by the King's command. Dallin Oaks, *Legal History in the High Court–Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966). This tradition of judicial review of executive detention was embraced by the colonies. *See* A.H. Carpenter, *Habeas Corpus in the Colonies*, 8 Am. Hist. Rev. 18, 26 (1902); *Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1045 (1970).

Following American independence, this Court had occasion to secure the importance of this tradition in the United States. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Court reviewed the pre-trial commitment of Aaron Burr's co-conspirators who had been detained on the basis of affidavits and a message from President Jefferson. *United States v. Bollman*, 24 F. Cas. 1189, 1195-96 (C.D.C.

1807) (No. 14,622). The Court, however, did not defer to the evidence presented by the government, but engaged in "an examination of the evidence upon which the commitment was grounded." 8 U.S. (4 Cranch) at 125. After scrutinizing the evidence marshaled against the detainees, the Court ordered their discharge on the ground that the government had failed to establish probable cause to detain the petitioners for trial on charges of treason. *Id.* at 136-37. *Ex parte Bollman* reveals that federal courts are well-positioned to evaluate the Executive branch's justification for detention even in cases involving the most sensitive threats to national security.

In contrast, the Fourth Circuit failed to cite a single court in the history of habeas corpus jurisprudence that has limited judicial review because of the separation of powers. *Cf. Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 100 (1869) (rejecting argument that Court did not have jurisdiction to review military's imprisonment of citizen in Mississippi). That is because federal courts are fully equipped to evaluate conduct by the military that affects the rights of citizens, and determine whether that conduct is consistent with the Constitution. *See Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality); *Raymond v. Thomas*, 91 U.S. 712, 716 (1875); *Mitchell v. Harmony*, 54 U.S. (13 How.) at 134.

Congress, of course, has affirmatively authorized federal courts to "hear and determine the facts" in habeas corpus proceedings, and allowed habeas corpus petitioners to "deny any of the facts set forth in the return or allege any other material



facts." *See* 28 U.S.C. §§ 2243, 2246. By empowering federal courts to inquire into the nature of a person's confinement in a habeas corpus proceeding, Congress has ensured that the Judiciary can serve as a check against unauthorized Executive detentions.

Habeas corpus proceedings thus constitute part and parcel of the separation of powers between our branches of government. Urging ratification of the Constitution, James Madison stated that "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48. The writ of habeas corpus is an instrument of this design. *See Parisi v. Davidson*, 405 U.S. 34, 49 (1972) (Douglas, J., concurring) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds."); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) ("The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.").

2. The Fourth Circuit's analysis of the separation of powers doctrine, drawn almost exclusively from its reading of "the warmaking powers of Article I and II" of the Constitution, (App. 21a), ignores the language in Article I most directed to

Hamdi's predicament: the Suspension Clause.[13] Indeed, the Suspension Clause refutes the Fourth Circuit's unsupported view that Article III courts have no role in reviewing facts attending the indefinite seizure of an American citizen during wartime.

The Suspension Clause spells out two inalterable circumstances under which the suspension power may be exercised, and contemplates judicial review by means of habeas corpus proceedings in every other case—at least to the extent authorized in 1789. *St. Cyr*, 533 U.S. at 301; *see also Developments in the Law: Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1267 (1970). The Judiciary Act of 1789 enabled federal courts to issue writs of habeas corpus to prisoners in custody by "the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. The dimension of this statutory authority, however, was rooted in the common law. *See Ex parte Bollman*, 8 U.S. (4 Cranch) at 94-95. And under the common law, judicial review of the return was least deferential in the context of executive detentions. *See* Rollin Hurd, *The Writ of Habeas Corpus* 271 (2d ed. 1876) (noting that in cases of noncriminal imprisonment, the exceptions to the general rule against controverting the return were "governed by a principle sufficiently comprehensive to include most . . . cases"); Jonathan Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 Yale L.J. 2509, 2526 (1998) ("at common law executive detentions . . . triggered a broad scope of review on habeas").

[13] Section 9, Clause 2 of Article I of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."



Judicial review of executive detentions by way of habeas corpus historically was more searching than review of criminal convictions because of the absence of any prior judicial determination of the petitioner's rights. *See, e.g.*, Hurd, *supra*, at 268; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963); Hafetz, *supra*, at 2535-36. Under the guise of the separation of powers doctrine, however, the Fourth Circuit simply eliminated the extensive judicial review of Executive detentions protected by the Suspension Clause in favor of Executive power.

3. The Fourth Circuit's ruling also is entirely inconsistent with this Court's long experience with the review of Executive branch seizures. In *Mitchell v. Harmony*, this Court reviewed and rejected the military's seizure of a citizen's property in Mexico during the Mexican-American war. 54 U.S. (13 How.) at 128-29. The plaintiff, a naturalized American businessman, filed an action against a U.S. colonel to recover the value of his property seized by the military. The government responded that the businessman had a "design" to trade with the enemy, and that the decision of the military commander to seize the property "must be entitled to some respect." *Id.* at 118, 120.

Rejecting these arguments, Chief Justice Taney's opinion for the Court found the government's defense to be based on "rumors which reached the commanding officer." *Id.* at 133. "Mere suspicions of an illegal intention," the Court stated, "will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence." *Id.* If an Article III court, consistent with separation of powers principles, can inquire into the seizure of a citizen's property by the military within a country at war with the United States as in *Harmony*, these same principles surely pose no barrier to an inquiry into the seizure of the citizen himself.

In *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court rejected the virtually identical argument accepted by the Fourth Circuit that the "constitutional allocation of war powers," (App. 25a), precludes the judiciary from reviewing the circumstances related to the exercise of such powers. *Sterling* involved the authority of the governor of Texas to restrict the production of private oil wells in areas declared to be under martial law. Acknowledging the governor's license to maintain order, the Court stated:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power, to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The



> contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

287 U.S. at 400-01 (citing *Harmony*, 54 U.S. (13 How.) at 134). The Executive branch's authority with respect to the war powers and national security, in other words, does not make immune from judicial inquiry actions by the Executive branch in the name of war powers or national security. *See New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring); *United States v. United States Dist. Court*, 407 U.S. 297, 331-32 (1972); *United States v. Robel*, 389 U.S. 258, 263-64 (1967); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Nor is the Fourth Circuit's decision supported by precedent addressing similar facts. Like this case, *In re Territo*, 156 F.2d 142 (9th Cir. 1946), involved a habeas corpus petition filed by an American citizen to challenge his detention as a prisoner during World War II. Although the respondent filed a return "setting out . . . that Territo was captured in Italy upon the field of battle, and that he was at the time of capture a soldier in the enemy Italian Army," *id.* at 142-43, the district court held an evidentiary hearing—at which the petitioner was represented by counsel and allowed to testify—and subsequently issued factual findings. *Id.* at 142-43; *see also* Jess Bravin, *How a Ditchdigger for Mussolini Plays A Role in Terror War*, Wall St. J., Oct. 28, 2002, at A1, A11.

Even the Fourth Circuit suggested that its opinion constituted a departure from prior doctrine. (*See* App. 17a ("In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability.").) By holding that the military's indefinite detention of an American citizen, held far from any theater of combat, is immune from factual inquiry in a habeas corpus proceeding, however, the Fourth Circuit abdicated its role as an independent check on the Executive branch. Review by this Court is warranted because the Fourth Circuit's decision is both foreign to this Court's settled jurisprudence and contrary to the guarantee of independent habeas corpus review rooted in the Anglo-American legal tradition.

### B. Review Is Warranted Because the Ruling Conflicts with This Court's Decisions Upholding the Fundamental Right to Court Access

Although the Fourth Circuit acknowledged that "Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention," (App. 22a), the court denied Petitioner the opportunity to participate in the proceeding or to have access to his appointed lawyer.[14] By refusing

[14] According to the Fourth Circuit, "no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch." (App. 24a.) For this reason, the Fourth Circuit refused to permit Hamdi to "be heard in an Article III court to rebut the factual assertions that were



to permit either, the Fourth Circuit transformed Hamdi's entitlement into a fundamentally hollow exercise, and violated a line of this Court's precedents that support the constitutional guarantee of access to the courts.

The right of access to the courts is undeniably "well-established" by this Court's precedent, *Lewis v. Casey*, 518 U.S. 343, 350 (1996), and in its most basic form requires that "the state and its officers may not abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte Hull*, 312 U.S. 546, 549 (1941). Likewise, the government may not interfere with a habeas petitioner's assertion of legal claims. *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."); *accord Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

By refusing to allow Petitioner to participate in a habeas proceeding filed on his behalf, the Fourth Circuit's decision is incompatible with these bedrock principles expressed in this Court's precedent. As Judge Motz observed, "[d]enied the most basic procedural protections, Hamdi could not possibly mount a challenge to the

submitted to support the 'enemy combatant' designation." (*Id.*) Likewise, the Fourth Circuit steadfastly refused to permit Hamdi to meet with appointed counsel. *See Hamdi II*, 296 F.3d 278, 284 (4th Cir. 2002).

Executive's designation of him as an enemy combatant." (App. 63a.) Without the ability to speak to the allegation that one is an "enemy combatant," in other words, Petitioner has had no meaningful opportunity to assert the claim that his imprisonment is unlawful.

By the same token, the Fourth Circuit's refusal to allow Petitioner to have access to appointed counsel is equally inconsistent with this Court's precedent ensuring the right to court access. In *Procunier v. Martinez*, 416 U.S. 396, 419, 421-22 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court struck down a ban on the use of law students and paralegals to interview inmates because it "constituted an unjustifiable restriction on the right of access to the courts." Inmates "must have a reasonable opportunity to seek and receive the assistance of attorneys," the Court explained, in order to vindicate the right to access to courts guaranteed by the Due Process Clause. *Id.* at 419; *see also Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Ex parte Hull*, 312 U.S. at 549.

The restriction on access to courts at issue in *Procunier* pales in comparison to the limitation imposed by the Fourth Circuit. As a result of the Fourth Circuit's ruling, Americans alleged to be "enemy combatants" and purportedly found in a "zone of active combat" simply are not entitled to meet with appointed counsel. Although this Court has said that the government "cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963), the



Fourth Circuit's ruling does so in direct conflict with an established line of this Court's precedent ensuring the right of habeas petitioners to access to the courts.

## III. Review Is Warranted Because the Ruling Is Contrary to Constitutional Protections and Congressional Limitations Against Indefinite Detention Without Due Process

### A. The Due Process Clause Prohibits Hamdi's Indefinite and Effectively Incommunicado Detention Without a Hearing

The Fourth Circuit's ruling authorizes an unprecedented denial of both procedural and substantive due process to American citizens accused as enemy combatants. By refusing to allow Petitioner to be heard, and by acquiescing to his virtually incommunicado detention, the Fourth Circuit's opinion is flatly inconsistent with the requirements of the Due Process Clause.

The due process interest at stake is manifest. As this Court has remarked, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). And while the Fourth Circuit suggested that Hamdi's imprisonment does not constitute "punishment," but rather is a "simple war measure," (App. 16a), the truth is otherwise. Hamdi is not being treated as an ordinary prisoner of war,[15] and has not

[15] Prisoners of war generally cannot be held in correctional facilities, EPW Reg. 3-2(b) (J.A. 99), separated from their fellow soldiers, *id.* 3-4(b) (J.A. 100), quartered under conditions less favorable than U.S. troops, *id.* 3-4(e) (J.A. 101), or

been treated in accordance with the Geneva Convention Relevant to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), and United States military regulations designed to implement the GPW. *See* EPW Regulations (J.A. 91-126).[16]

1. The right to be heard in opposition to the government's effort to strip a person of his liberty is at the heart of the procedural protections due under the Constitution. *See Lachance v. Erickson*, 522 U.S. 262, 265 (1998); *Rock v. Arkansas*, 483 U.S. 44, 51 (1987); *Hughes v. Rowe*, 449 U.S. 5, 11 (1980); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or

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restricted from receiving mail, *id.* 3-5(a) (J.A. 101.)

[16] The Fourth Circuit held that the GPW was unenforceable because it evinces no intent to provide a right of action and therefore is not self-executing. The habeas statute itself, however, authorizes review of detention in violation of treaties. 28 U.S.C. § 2242(c)(3); *cf.* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 721 (1995) (explaining that whether treaty confers a right of action is "analytically distinct" from the question of self-execution).

As for the EPW Regulations designed to implement the GPW, "[s]o long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974); *accord Billings v. Truesdell*, 321 U.S. 542, 551 (1944); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942). The EPW Regulations provide that if any doubt exists whether a person is a prisoner of war, the person must be treated as such until his status is determined by a competent tribunal. EPW Reg. 1-6 (J.A. 96).



contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). By refusing to allow Petitioner to be heard in this habeas corpus proceeding, the Fourth Circuit has denied Petitioner this basic constitutional right.

Detention without the opportunity to be heard, moreover, constitutes a paradigmatic affront to the Due Process Clause. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-602 (1953); *accord Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such [Due Process] protection is obvious."). "[The Court] need go no further" to find the Executive branch's treatment of Hamdi unconstitutional. *See Kennedy*, 472 U.S. at 167.

In the absence of review by this Court, the Fourth Circuit's opinion threatens to permit the indefinite and virtually incommunicado imprisonment of innocent Americans by the government. As this Court acknowledged shortly after the Civil War, "military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony." *Lamar v. Brown*, 92 U.S. 187, 196 (1875); *accord* (App. 24a ("The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake.").) Indeed, such mistakes have been made by our forces in Afghanistan. *See* Carlotta Gall, *U.S. Sends 18 at Guantanamo To Afghanistan to Be*

*Freed*, N.Y. Times, Mar. 25, 2003, at B13; Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. Times, Dec. 22, 2002, at 1. At the significant risk of indefinitely perpetuating such errors made overseas, the appeals court refused to permit an American citizen—held for the most part within a few miles of an operating United States District Court—to meet with appointed counsel or the opportunity to have a voice in the underlying habeas proceedings in order to establish that a mistake had been made. This aspect of the lower court's decision "deserves repudiation." *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).

While the government's interest in detaining persons who fought for the former government in Afghanistan is not insubstantial, (*see* App. 16a), the Constitution requires that an American citizen indefinitely detained under that suspicion should be permitted the opportunity to be heard. The Fourth Circuit's contrary conclusion is worthy of review by this Court.

2. "[T]he Due Process Clause [also] contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). This substantive element prohibits, for example, government intrusion into certain intimate private conduct, *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003), interference in the exercise of parental rights, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), egregious and shocking



conduct by the government, *Chavez v. Martinez*, 123 S. Ct. 1994, 2005 (2003); *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998); and arbitrary deprivations of liberty, *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting); *Daniels*, 474 U.S. at 331.

The Executive branch's treatment of Petitioner is comparable to the type of conduct that offends the "decencies of civilized conduct" central to substantive due process. *See Rochin v. California*, 342 U.S. 165, 173 (1952); *cf. Demore v. Hyung Joon Kim*, 123 S. Ct. 1708, 1726 (2003) (Kennedy, J., concurring) (noting relation between the need for continued detention and prohibition on arbitrary deprivations of liberty). Under the Fourth Circuit's ruling, in the absence of press coverage or an eligible "next friend," an American citizen labeled as an "enemy combatant" may be entirely unknown to the legal system, a possibility that could not be more at odds with the Constitution. *Cf.* The Federalist No. 84 (Alexander Hamilton) ("[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government."). Whether the effectively incommunicado detention and interrogation of an American citizen for almost two years is consistent with the substantive protections afforded by the Due Process Clause deserves plenary review by this Court.

### B. Congress Prohibited the Executive Branch from the Indefinite Detention of American Citizens Without Process

The Constitution provides no inherent authority for the Executive branch to indefinitely detain American citizens in the United States, and Congress has expressly forbidden it in the absence of statutory authorization. Indeed, Congress could not have been more clear in requiring explicit legislative authority for the detention of citizens. *See* 18 U.S.C. § 4001(a). Because the Executive branch possesses power solely by virtue of the Constitution and the Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), and no statute explicitly permits the indefinite detention at issue, the unprecedented expression of Executive power upheld by the Fourth Circuit is illegitimate.

Section 4001(a) of Title 18 states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The statute "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

The fact that only Congress may authorize detentions in the United States is not a recent innovation. It is Congress, not the President, that is empowered under the Constitution to suspend the writ of habeas corpus. *Ex parte Merryman*, 17 F. Cas. 144, 149-50 (C.C. Md. 1861). Furthermore, as this Court acknowledged long before



the passage of § 4001(a), "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law." *Valentine v. United States*, 299 U.S. 5, 9 (1936); *cf. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866) (Chase, C.J., concurring) ("[I]n our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain."). Authorization for the detention of citizens, in other words, is not a subject "within [the President's] domain and beyond control by Congress." *Youngstown Sheet & Tube Co.*, 343 U.S. at 640 (Jackson, J., concurring).[17]

Even in the context of the exercise of war powers, Congress must supply the authority to detain outside of the environment of actual fighting. One of the earliest statutes passed by Congress, for example, was the Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577, which allowed the President to detain and deport enemy aliens found in the United States following a formal declaration of war. *See Ludecke v. Watkins*, 335 U.S. 160, 161 (1948). Any Executive power to indefinitely detain Hamdi in the United States, similarly, must be drawn from congressional authorization.

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[17] To the extent that the Fourth Circuit located an inherent Executive power to detain citizens, such authority is "most vulnerable to attack and in the least favorable of possible constitutional postures." *Youngstown Sheet & Tube Co.*, 343 U.S. at 637, 640 (Jackson, J., concurring). The exercise of such authority could be sustained only if the detention of citizens was "beyond control" by Congress, *see id.*, a proposition plainly contrary to § 4001(a), not to mention the rest of Title 18 of the U.S. Code.

The Fourth Circuit held that, by authorizing the Executive branch to "use all necessary and appropriate force" against the countries, organizations, or individuals that committed the terrorist attacks that took place on September 11, 2001, Authorization for Use of Military Force, Act of Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001), Congress *implicitly* authorized the Executive branch to detain belligerents, including citizens, in the absence of a provision that "provide[d] American belligerents some immunity from capture and detention." (App. 19a.) The authorization for the use of force, naturally, is silent with regard to the indefinite detention of American citizens.

Contrary to the Fourth Circuit's ruling, however, implicit wartime powers sustain only the least burdensome restraint on citizens that is demanded by the most explicit statutory language:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, *when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.*



*Ex parte Endo*, 323 U.S. 283, 300 (1944) (emphasis added).[18] Accordingly, the Court in *Endo* held that Congress, under the auspices of a statutory evacuation program, had not "clearly and unmistakably" authorized the indefinite detention of citizens of Japanese descent. *Id.* at 303-04.

The Court's holding in *Endo* reflects a long tradition of close scrutiny applied to statutes cited in support of military control over citizens. *See Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that Congress did not intend to supplant civilian court system when it authorized martial law in territory of Hawaii); *Ex parte Quirin*, 317 U.S. 1, 28 (1942) ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."); *Raymond v. Thomas*, 91 U.S. 712, 716 (1875) (holding that military order annulling judicial order unauthorized by Congress and therefore void); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 135 (Chase, C.J., concurring) (noting that Congress had not authorized Milligan's seizure). The absence of an

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[18] Similarly, this Court found that general congressional appropriations that do not "plainly show a purpose to bestow the precise authority which is claimed" were insufficient to justify the detention of American citizens. *Id.* at 303 n.24. The government in *Endo* made no argument that the congressional declaration of war by itself permitted the indefinite detention of citizens. *See* U.S. Const. art. I, § 8 cl. 11.

explicit congressional grant of authority, in other words, establishes the unlawfulness of military authority over citizens.

The Fourth Circuit's analysis not only presupposes the belligerent character of American detainees—or at least that such character is a unilateral and unreviewable Executive determination—but it also approaches the question of Executive power from the wrong starting place. By asking whether Congress in its authorization for the use of force has expressly withheld from the Executive branch, rather than expressly authorized, the detention of citizens, the Fourth Circuit assumes the existence of a power to indefinitely detain Americans that the Executive branch does not possess.

Because no statute "clearly and unmistakably" authorizes the Executive branch to indefinitely detain Hamdi as required by 18 U.S.C. § 4001(a), his continued detention is unlawful. The Fourth Circuit's authorization of the Executive branch's detention of Petitioner without statutory authority warrants plenary review by this Court.

## CONCLUSION

The Constitution requires that Petitioner be allowed to challenge his indefinite detention, meet with counsel, present evidence, and participate in his habeas corpus proceeding. As the Fourth Circuit recognized in *Hamdi II*, 296 F.3d at 283, however, the procedures governing that inquiry must be crafted by the district court in the first



instance and must be designed to both protect the government's legitimate security concerns as well as ensure the court's ability to exercise independent review of Petitioner's detention.

The threat posed by the accumulation of power in one branch of government, an evil well-known to the Founders, is a guiding principle behind the Constitution. In support of ratification, Alexander Hamilton quoted from Montesquieu: "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78. Because the Fourth Circuit's decision requires no separation between the exercise of Executive power and the judgment that leads to the indefinite and effectively incommunicado imprisonment of an American citizen, it poses a grave threat to the liberty of all Americans.

The petition for a writ of certiorari should be granted.

FRANK W. DUNHAM, JR.
Federal Public Defender
for the Eastern District of Virginia

Frank W. Dunham, Jr.
Federal Public Defender
Counsel of Record
Geremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

October 1, 2003

# APPENDIX



*C. Prejudgment Interest*

[23] Scottsdale claims that even if there was a duty to represent Freddie Mac, the district court should not have granted prejudgment interest because, in Scottsdale's view, "since no demand for a copy of the policy and/or coverage was made before the settlement was reached, no prejudgment interest is owed." *Id.* at 56.

In *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557 (3d Cir.1998), we held that "[u]nder New Jersey law, a court may award prejudgment interest in its discretion in accordance with equitable principles, and the court's exercise of its discretion should not be disturbed on appeal unless it represents a manifest denial of justice." *Id.* at 574 (citations and internal quotation marks omitted). Scottsdale does not make any argument that there was a manifest denial of justice, and we therefore reject this challenge.

IV.

Freddie Mac's cross-appeal, at No. 01-4356, raises only a single issue. In Freddie Mac's view, the district court erred in setting October 25, 1999, as the date from which prejudgment interest would run.

[24] As we noted above, we review a district court's award of prejudgment interest to determine whether such award constituted a manifest denial of justice. Freddie Mac has merely argued that because the New Jersey court rule governing prejudgment interest applies by its terms to tort actions only, the district court did not have to consider itself bound to apply the rule's terms literally when it awarded prejudgment interest in its discretion. Instead, Freddie Mac claims that the district court should have concluded that prejudgment interest should run from the dates when Freddie Mac issued settlement payments—in June and August 1998. Freddie Mac. Br. at 59.

Freddie Mac has made no argument, nor given us reason to hold, that the district court's exercise of discretion constituted a manifest denial of justice. We will therefore affirm the district court's judgment against Freddie Mac in its cross-appeal.

V.

For the foregoing reasons, we will affirm the judgment of the district court in all respects.

**Yaser Esam HAMDI; Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi, Petitioners-Appellees,**

**v.**

**Donald RUMSFELD; W.R. Paulette, Commander, Respondents-Appellants.**

**Center for Constitutional Rights; Richard L. Abel, Connell Professor of Law, University of California at Los Angeles; William J. Aceves, Professor of Law, California Western School of Law; Bruce A. Ackerman, Sterling Professor of Law & Political Science, Yale University; Lee A. Albert, Professor of Law, University at Buffalo Law School, The State University of New York; Barbara Bader Aldave, Loran L. Stewart Professor of Corporate Law, University of Oregon School of Law; Alicia Alvarez, Clinical Associate Professor of Law, DePaul University School of Law; Diane Marie Amann, Professor of**

Law, University of California, Davis, School of Law; Michelle J. Anderson, Associate Professor of Law, Villanova University School of Law; Fran Ansley, Professor of Law, University of Tennessee College of Law; Elvia R. Arriola, Associate Professor of Law, Northern Illinois University College of Law; Frank Askin, Professor of Law and Robert Knowlton Scholar, Rutgers School of Law at Newark; Milner S. Ball, Caldwell Professor of Constitutional Law, University of Georgia School of Law; Jon Bauer, Clinical Professor of Law and Director, Asylum & Human Rights Clinic University of Connecticut School of Law; Paul Schiff Berman, Associate Professor, University of Connecticut School of Law; Cynthia Bowman, Professor of Law, Northwestern University School of Law; Mark S. Brodin, Professor of Law, Boston College Law School; Bartram S. Brown, Professor of Law, Chicago–Kent College of Law, Illinois Institute of Technology; Sue Bryant, Director of Clinical Education and Associate Professor of Law, CUNY School of Law; Burton Caine, Professor of Law, Temple University School of Law; Emily Calhoun, Professor of Law, University of Colorado School of Law; Anupam Chander, Acting Professor of Law, University of California, Davis, School of Law; Erwin Chemerinsky, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School; Paul G. Chevigny, Joel S. and Anne B. Ehrenkranz Professor of Law, New York University Law School; Paul Chill, Clinical Professor of Law, University of Connecticut School of Law; Gabriel J. Chin, Rufus King Professor of Law, University of Cincinnati College of Law; Carol Chomsky, Associate Professor of Law, University of Minnesota Law School; Margaret Chon, Associate Professor of Law, Seattle University School of Law; Marjorie Cohn, Associate Professor of Law, Thomas Jefferson School of Law, San Diego; Robin Morris Collin, Professor of Law, University of Oregon School of Law; Dennis E. Curtis, Clinical Professor of Law, Yale Law School; Erin Daly, Associate Professor of Law, Widener University; Michael H. Davis, Professor of Law, Cleveland State University; Michael Deutsch, Adjunct Professor of Law, Northwestern University School of Law; Laura Dickinson, Associate Professor, University of Connecticut School of Law; Robert Dinerstein, Associate Dean and Professor of Law, American University, Washington College of Law; Jane Dolkart, Associate Professor of Law, Dedman School of Law, Southern Methodist University; Sharon Dolovich, Acting Professor of Law, University of California at Los Angeles; Douglas L. Donoho, Professor of Law, Nova Southeastern University, Shepard Broad Law Center; Dolores Donovan, Professor of Law, University of San Francisco School of Law; Mary L. Dudziak, Judge Edward J. and Ruey L. Guirado Professor of Law and History, University of Southern California Law School; Visiting Research Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University; Pamela Edwards, Assistant Professor of Law, CUNY School of Law; Nancy Ehrenreich, Associate Professor of Law, University of Denver College of Law; Rosa Ehrenreich Brooks, Associate Professor of Law, University of Virginia School of Law; J. Soffiyah Elijah, Clinical Instructor, Criminal Justice Institute, Harvard Law School; Susan J. Feathers, Esq., Director, Public Service Program, University of Pennsylvania Law School; Marvin Fein, Associate Professor, University of Pittsburgh School of Law; Todd D. Fernow, Professor of Law, Director, Criminal Clinic, University of Connecticut School of Law; Sally Frank, Professor of Law, Drake University School of Law; Katherine Franke, Professor of Law, Columbia University; Eric M. Freedman, Professor of Law, Hofstra University School of Law; Niels W. Frenzen, Clinical Assistant Professor of Law, University of Southern California; Craig B. Futterman, Assistant Clinical Professor of Law, University of Chicago Law School; Kristin Booth Glen, Dean and Professor of Law, CUNY School of Law; Brian Glick, Associate Clinical Professor of Law, Fordham Law School; Howard A. Glickstein, Dean and Professor of Law, Touro Law School; Phyllis Goldfarb, Professor of Law, Boston College Law School; Bob Golten, Director, International Human Rights Advocacy Center, University of Denver; Carlos E. Gonzalez, Associate Professor of Law, Rutgers School of Law—Newark; Visiting Associate Professor of Law, Santa Clara University School of Law; Kenneth W. Graham, Jr., Professor of Law, University of California at Los Angeles; Ariela Gross, Professor of Law & History, The Law School, University of Southern California; Louise Halper, Professor of Law, Washington & Lee University School of Law; Joel F. Handler, Richard C. Maxwell Professor of Law and Professor of Policy Studies, School of Public Policy and Social Research, University of California at Los Angeles; Sidney L. Harring, Professor of Law, CUNY Law School; Virginia Hench, Associate Professor of Criminal Law & Procedure & Civil Rights, University of Hawaii—Manoa; Kathy Hessler, Professor, Case Western Reserve University School of Law; Judith L. Holmes, Assistant Professor of Legal Studies, University of Massachusetts—Amherst; Wythe W. Holt, Jr., University Research Professor of Law, University of Alabama School of Law; Joan Howarth, Professor of Law, University of Nevada, Las Vegas; Marsha Huie, Professor of Law, The University of Tulsa College of Law; Eric S. Janus, Professor of Law, William Mitchell College of Law; Paula C. Johnson, Associate Professor of Law, Syracuse University College of Law; Jose R. Juarez, Jr., Professor of Law, St. Mary's University School of Law; David Kairys, James E. Beasley Professor of Law, Beasley School of Law, Temple University; Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, University of Michigan; Jerry Kang, Professor of Law, University of California at Los Angeles; Lewis R. Katz, John C. Hutchins Professor of Law, Case Western Reserve University Law School; Eileen Kaufman, Professor of Law, Touro Law School; Michael J. Kelly, Assistant Professor, Creighton University School of Law; Raneta Lawson Mack, Professor of Law, Creighton University School of Law; David P. Leonard, Professor of Law and William M. Rains Fellow, Loyola Law

School, Los Angeles; John Leubsdorf, Professor of Law, Rutgers Law School–Newark; Martin L. Levy, Professor, Thurgood Marshall School of Law, Texas Southern University; Jules Lobel, Professor of Law, University of Pittsburgh Law School; David Luban, Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center; Beth Lyon, Assistant Professor of Law, Villanova University School of Law; Holly Maguigan, Professor of Clinical Law, New York University School of Law; Samuel A. Marcosson, Associate Professor, Louis D. Brandeis School of Law, University of Louisville; Gary M. Maveal, Associate Professor of Law, University of Detroit Mercy School of Law; Robert F. Meagher, Emeritus Professor, Fletcher School of Law and Diplomacy, Tufts University; Carlin Meyer, Professor of Law, New York Law School; Jonathan M. Miller, Professor of Law, Southwestern University School of Law; Margaret E. Montoya, Professor of Law, University of New Mexico School of Law; Beverly Moran, Professor of Law, Professor of Sociology, Vanderbilt University School of Law; David A. Moran, Assistant Professor of Law, Wayne State University Law School; Mary-Beth Moylan, Instructor of Law, University of the Pacific, McGeorge School of Law; Millard A. Murphy, Esq., Clinical Instructor, Prison Law Clinic, University of California, Davis, School of Law; Kenneth B. Nunn, Professor of Law, Fredric G. Levin College of Law, University of Florida; James P. Ogilvy, Associate Professor of Law, Columbus School of Law, The Catholic University of America; Nancy K. Ota, Professor of Law, Albany Law School; Marc R. Poirier, Professor of Law, Seton Hall Law School; James Pope, Professor of Law and Sidney Reitman Scholar, Rutgers University School of Law; Deborah W. Post, Professor of Law, Touro Law School; William Quigley, Professor of Law and Director of the Loyola Law Clinic & the Gillis Long Poverty Law Center, Loyola Law School; Margaret Jane Radin, Wm. Benjamin Scott and Luna M. Scott Professor of Law, Stanford Law School; Martha Rayner, Associate Clinical Professor of Law, Fordham University School of Law; Judith Resnick, Arthur Liman Professor of Law, Yale Law School; Paula R. Rhodes, Associate Professor of Law, Director, LLM in American and Comparative Law Program, University of Denver College of Law; Henry J. Richardson, III, Peter J. Liacouras Professor of Law, Temple Law School; Annelise Riles, Professor of Law and Professor of Anthropology, Cornell University; Toni Robinson, Professor of Law, Quinnipiac School of Law; Florence Wagman Roisman, Professor of Law and Paul Beam Fellow, Indiana University School of Law–Indianapolis; Kermit Roosevelt, Assistant Professor, University of Pennsylvania Law School; Tanina Rostain, Associate Professor, New York Law School; Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale University; David Rudovsky, Senior Fellow, University of Pennsylvania Law School; Leila Nadya Sadat, Professor of Law, Washington University in St. Louis; Natsu Taylor Saito, Professor of Law, Georgia State University College of Law; Robert F. Seibel, Professor of Law, CUNY Law School; Franklin Siegel, City University of New York School of Law; Robert A. Sedler, Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties, Wayne State University; Marci Seville, Associate Professor of Law and Director, Women's Employment Rights Clinic, Golden Gate University School of Law; Marjorie Silver, Professor, Touro Law Center; Eileen Silverstein, Zephaniah Swift Professor of Law, University of Connecticut; David Sloss, Assistant Professor of Law, Saint Louis University School of Law; Ronald C. Slye, Associate Professor, Seattle University School of Law; Lloyd B. Snyder, Professor of Law, Cleveland State University; Andrej Thomas Starkis, Assistant Professor of Law, Massachusetts School of Law; Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law; Joan Steinman, Distinguished Professor of Law, Chicago-Kent College of Law; Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law; Robert L. Tsai, Assistant Professor of Law, University of Oregon School of Law; Beth Van Schaack, Assistant Professor, Santa Clara University School of Law; Deborah M. Weissman, Associate Professor of Law and Director of Clinical Programs, University of North Carolina School of Law; Charles E. Wilson, Associate Professor of Law, The Ohio State University College of Law; Richard J. Wilson, Professor, Washington College of Law, American University; Adam Winkler, Acting Professor of Law, University of California at Los Angeles; Stephen Wizner, William O. Douglas Clinical Professor of Law and Supervising Attorney, Yale Law School; Mark E. Wojcik, Associate Professor of Law, The John Marshall Law School, Chicago; Frank H. Wu, Professor of Law, Howard University; Cliff Zimmerman, Clinical Associate Professor of Law, Northwestern University; National Lawyers' Guild, Heidi Boghosian, Executive Director; National Immigration Project of The National Lawyers Guild, Dan Kesselbrenner, Executive Director; National Lawyers Guild New York Chapter, Dana Biberman, President; Human Rights Watch, James Ross, Senior Legal Counsel; Southern Poverty Law Center, Rhonda Brownstein, Legal Director; Unitarian Universalist Service Committee, Denise Moorehead, Deputy Director of Program; Puerto Rico Legal Defense and Education Fund, Incorporated, Foster Maer, Acting Legal Director; National Coalition to Protect Political Freedom, Kit Gage, President; First Amendment Foundation, Kit Gage, Director; National Lawyer's Guild/Maurice & Jane Sugar Law Center For Economic & Social Justice, Julie Hurwitz, Executive Director; Civil Liberties Monitoring Project, Jared Rossman, President; Association of Legal Aid Attorneys, U.A.W. Local 2325, Michael Letwin, Esq., President; Partnership for Civil Justice, Mara Verheyden-Hilliard, co-founder; Trial Lawyers for Public Justice, Rebecca Epstein, Staff Attorney; Freedom Socialist Party, Val Carlson; Jewish Alliance for Law and Social Action, Andrew M. Fischer; The Innocence Project at The Benjamin N. Cardozo School of Law, Nina Morrison, Esq., Executive Director; Ella Baker Center for Human Rights, Van Jones, National Executive Director; American Friends Service Committee, Mary Ellen McNish, General Secretary; Reber Boult, Esq., Albuquerque, New

**Mexico; Hunter Gray; John Mage, Esq., New York, New York; Douglas N. Masters, Esq., Chicago, Illinois; Laura Beth Nielsen, Research Fellow, American Bar Foundation; Leonard Weinglass, Esq., New York, New York; Camille Whitworth, Esq., Austin, Texas; Mitchell Zimmerman, Esq., Co-Coordinator, Law Professors for the Rule of Law; National Association of Criminal Defense Lawyers; American Civil Liberties Union Foundation; American Civil Liberties Foundation of Virginia, Amici Curiae in support of Appellees.**

**Ruth Wedgwood, Professor of Law, Yale University Law School; Samuel Estreicher, Professor of Law, New York University School of Law; Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, Catholic University; Ronald Rotunda, George Mason University Foundation Professor of Law, George Mason University School of Law; David B. Rivkin, Jr.; Lee A. Casey; Darin R. Bartram, Amici Curiae in support of Appellants.**

**No. 02-7338.**

United States Court of Appeals, Fourth Circuit.

Argued Oct. 28, 2002.

Decided Jan. 8, 2003.

Father of military detainee, an American citizen who was captured as an alleged enemy combatant during military operations in Afghanistan, petitioned, as detainee's next friend, for writ of habeas corpus. The United States District Court for the Eastern District of Virginia, Robert G. Doumar, J., appointed counsel and ordered government to allow counsel unmonitored access to detainee. Government appealed. The Court of Appeals, 296 F.3d 278, reversed and remanded. On remand, the United States District Court for the Eastern District of Virginia, Robert G. Doumar, Senior District Judge, ordered production of additional material regarding detainee's status, and government petitioned for interlocutory review. The Court of Appeals held that: (1) detention was authorized by Congress; (2) detainee did not have right under Geneva Convention to formal hearing to determine his status as enemy belligerent; (3) district court's order impermissibly conflicted with constitutional warmaking powers of President and Congress; and (4) government's affidavit was sufficient to establish that detention conformed with legitimate exercise of the President's war powers.

Reversed and remanded with directions.

**1. Constitutional Law ⇐50, 76**

Congress and the President, like the courts, possess no power not derived from the Constitution.

**2. War and National Emergency ⇐2**

Constitutional war powers invest the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war. U.S.C.A. Const. Art. 2, § 2, cl. 2.





**3. War and National Emergency ⇐11**

President's war powers include the authority to detain those captured in armed struggle.

**4. War and National Emergency ⇐11, 29**

President's war powers extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, and to confiscate or destroy enemy property. U.S.C.A. Const. Art. 2, § 2, cl. 2.

**5. Constitutional Law ⇐72**

Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited.

**6. Constitutional Law ⇐67**

Duty of the judicial branch to protect our individual freedoms does not simply cease whenever military forces are committed by the political branches to armed conflict.

**7. Habeas Corpus ⇐441**

Detention of United States citizens must be subject to judicial review.

**8. Habeas Corpus ⇐461**

Habeas petition challenging detention of American citizen as enemy combatant following his capture during military operations in Afghanistan fell within scope of habeas review, since detainee was an American citizen challenging his summary detention for reasons of state necessity.

**9. War and National Emergency ⇐11**

There is a well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, and enemy belligerents, prisoners of war, and others charged with violating the laws of war.

**10. War and National Emergency ⇐11**

Object of capture of enemy combatant is to prevent the captured individual from serving the enemy; he is disarmed and from then on he must be removed as completely as practicable from the front.

**11. Constitutional Law ⇐67**

Judiciary is not at liberty to eviscerate detention interests directly derived from constitutional war powers.

**12. Federal Courts ⇐768.1**

Appellate court may address any issue fairly included within the certified order, because it is the order that is appealable, and not the controlling question identified by the district court.

**13. Habeas Corpus ⇐818**

Challenges to validity of American citizen's detention as enemy combatant following his capture during military operations in Afghanistan was includable within the scope of the certified order entered in habeas proceeding, certifying question of whether government's declaration was sufficient to allow meaningful judicial review of detainee's classification as enemy combatant. Fed.Rules Civ.Proc.Rule 26(b)(1, 2), 28 U.S.C.A.

**14. Habeas Corpus ⇐911**

Court of Appeals' refusal to order habeas relief requested by petitioner, an American citizen who was held as enemy combatant following his capture during military operations in Afghanistan, was not equivalent to unconstitutional suspension of the writ. U.S.C.A. Const. Art. 1, § 9, cl. 2.

**15. War and National Emergency ⇐11**

Even if statute regulating detention of United States citizens required Congressional authorization for detention of American citizen as enemy combatant following his capture during military operations in Afghanistan, Congress authorized such detention when it authorized President to "use all necessary and appropriate force"

against nations, organizations, or persons involved in September 11 terrorist attacks and made appropriations for the detention of persons "similar to prisoners of war." 18 U.S.C.A. § 4001; 10 U.S.C.A. § 956(5).

16. **War and National Emergency** ⇐11

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of his belligerency.

17. **Treaties** ⇐12, 13
**War and National Emergency** ⇐11

American citizen who was detained as enemy combatant following his capture during military operations in Afghanistan did not have right under Geneva Convention Relative to the Treatment of Prisoners of War to formal hearing to determine his status as enemy belligerent; Convention was not self-executing.

18. **Treaties** ⇐12

Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.

19. **Treaties** ⇐12, 13
**War and National Emergency** ⇐11

Geneva Convention Relative to the Treatment of Prisoners of War is not self-executing and does not create private rights of action in the domestic courts of the signatory countries.

20. **War and National Emergency** ⇐11, 32

Unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful; but they are also subject to mere detention in precisely the same way that lawful prisoners of war are.

21. **Constitutional Law** ⇐70.1(12), 72
**Habeas Corpus** ⇐688
**War and National Emergency** ⇐11

Order entered in habeas proceeding, requiring government to produce various materials relating to American citizen's capture in Afghanistan in order to justify his continued detention as enemy combatant, impermissibly conflicted with constitutional warmaking powers of President and Congress; specific interests asserted by the government flowed directly from its warmaking powers and were intimately connected to them. 28 U.S.C.A. § 2241.

22. **Constitutional Law** ⇐76

The President is best prepared to exercise the military judgment attending the capture of alleged combatants.

23. **Constitutional Law** ⇐72
**War and National Emergency** ⇐11

Detentions ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger should not be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

24. **Habeas Corpus** ⇐711

It is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority.

25. **War and National Emergency** ⇐11

Government's affidavit describing capture of American citizen in active combat zone during military operations in Afghanistan was sufficient to establish that his detention as enemy combatant conformed with legitimate exercise of President's war powers; government alleged that detainee was affiliated with enemy military unit and was in possession of a rifle at time he surrendered to Allied forces. U.S.C.A. Const. Art. 2, § 2, cl. 2.





26. **Habeas Corpus** ⇐461
**War and National Emergency** ⇐32

Habeas petitioner, an American citizen who was captured in zone of active combat operations in Afghanistan and was detained on American soil as enemy combatant, was not entitled to evidentiary hearing or factual inquiry by Article III court to rebut factual assertions that were submitted by government to support his enemy combatant designation.

27. **Constitutional Law** ⇐72

Courts cannot set aside executive decisions to detain enemy combatants without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.

28. **Constitutional Law** ⇐72
**War and National Emergency** ⇐37

Constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. U.S.C.A. Const. Art. 2, § 2, cl. 2.

29. **Constitutional Law** ⇐72

While the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

30. **Habeas Corpus** ⇐662.1
**War and National Emergency** ⇐11

American citizenship of petitioner held as enemy combatant following his capture during military operations in Afghanistan entitled him to file habeas petition to challenge his detention, but did not affect the legality of his detention.

31. **War and National Emergency** ⇐11

One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such.

32. **War and National Emergency** ⇐11

For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another.

33. **War and National Emergency** ⇐11

Hostilities leading to petitioner's capture had not reached an end, supporting his continued detention as enemy combatant following his surrender during military operations in Afghanistan; American troops were still on the ground in Afghanistan, dismantling terrorist infrastructure and engaging in reconstruction efforts which could prove dangerous in their own right.

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**ARGUED:** Paul Clement, Deputy Solicitor General, United States Department of Justice, Washington, D.C., for Appellants. Frank Willard Dunham, Jr., Federal Public Defender, Norfolk, Virginia, for Appellees. **ON BRIEF:** Paul J. McNulty, United States Attorney, Gregory G. Garre, Assistant to the Solicitor General, David B. Salmons, Assistant to the Solicitor General, Lawrence R. Leonard, Managing Assistant United States Attorney, United States Department of Justice, Washington, D.C., for Appellants. Larry W. Shelton, Assistant Federal Public Defender, Geremy C. Kamens, Assistant Federal Public Defender, Norfolk, Virginia, for Appellees. David B. Rivkin, Jr., Lee A. Casey, Darin R. Bartram, Baker & Hostetler, L.L.P., Washington, D.C., for Amici Curiae Ruth Wedgwood, et al. Shayana Kadidal, Barbara Olshansky, Michael Ratner, William

Goodman, Center for Constitutional Rights, New York, New York, for Amici Curiae Center for Constitutional Rights, et al. Steven D. Benjamin, Richmond, Virginia; Donald G. Rehkopf, Jr., Brenna & Brenna, Rochester, New York, for Amicus Curiae Association of Criminal Defense Lawyers. Steven R. Shapiro, Lucas Guttentag, Arthur N. Eisenberg, Robin Goldfaden, American Civil Liberties Union Foundation, New York, New York; Rebecca K. Glenberg, American Civil Liberties Union of Virginia, Richmond, Virginia, for Amici Curiae ACLU, et al.

Before WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges.

Reversed and remanded with directions to dismiss by published opinion. Opinion by WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges, in which all three concur.

WILKINSON, Chief Judge, and WILKINS and TRAXLER, Circuit Judges.

Yaser Esam Hamdi filed a petition under 28 U.S.C. § 2241 challenging the lawfulness of his confinement in the Norfolk Naval Brig.[1] On this third and latest appeal, the United States challenges the district court's order requiring the production of various materials regarding Hamdi's status as an alleged enemy combatant. The district court certified for appeal the question of whether a declaration by a Special Advisor to the Under Secretary of Defense for Policy setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention. Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.

I.

As recounted in earlier appeals regarding Hamdi's detention, *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir.2002) ("*Hamdi I*"), and *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir.2002) ("*Hamdi II*"), the al Qaida terrorist network, utilizing commercial airliners, launched massive attacks on the United States on September 11, 2001, successfully striking the World Trade Center in New York City, and the Pentagon, the military headquarters of our country, near Washington, D.C. A third unsuccessful attack upon at least one additional target, most likely within Washington, D.C., was foiled by the efforts of the passengers and crew on the hijacked airliner when it crashed in Somerset County, Pennsylvania, southeast of Pittsburgh. In total, over 3,000 people were killed on American soil that day.

In the wake of this atrocity, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001). The President responded by ordering United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime supporting it. During this ongoing military operation, thousands of alleged enemy combatants, including Hamdi, have been captured by American and allied forces.

1. The court expresses its appreciation to the Public Defender's Office for the Eastern District of Virginia, the United States Attorney's Office for the Eastern District of Virginia, and the Solicitor General's Office for the professionalism of their efforts throughout these expedited appeals.





The present case arises out of Hamdi's detention by the United States military in Norfolk, Virginia. Hamdi apparently was born in Louisiana but left for Saudi Arabia when he was a small child. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk Naval Station Brig after it was discovered that he may not have renounced his American citizenship. He has remained in Norfolk since April 2002.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for writ of habeas corpus, naming as petitioners both Hamdi and himself as next friend.[2] The petition alleged that Hamdi is a citizen of the United States who was residing in Afghanistan when he was seized by the United States government. According to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the Northern Alliance." The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" in Afghanistan, transported from Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba, in January 2002, and ultimately transferred to the Norfolk Naval Station Brig in Norfolk, Virginia, in April 2002.

Although acknowledging that Hamdi was seized in Afghanistan during a time of active military hostilities, the petition alleges that "as an American citizen, ... Hamdi enjoys the full protections of the Constitution," and that the government's current detention of him in this country without charges, access to a judicial tribunal, or the right to counsel, "violate[s] the Fifth and Fourteenth Amendments to the United States Constitution." By way of relief, the petition asks, inter alia, that the district court: (1) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending"; (2) "Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution"; (3) "To the extent Respondents contest any material factual allegations in th[e] Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody."

On June 11, before the government had time to respond to the petition, the district court appointed Public Defender Frank Dunham as counsel for the detainee and ordered the government to allow the Defender unmonitored access to Hamdi. On July 12, we reversed the district court's order granting counsel immediate access to Hamdi. *Hamdi II*, 296 F.3d at 279. We cautioned that Hamdi's petition involved complex and serious national security issues and found that the district court

2. This court has previously determined that Esam Fouad Hamdi is a proper next friend. *Hamdi I*, 294 F.3d at 600 n. 1. Two earlier petitions filed by the Federal Public Defender for the Eastern District of Virginia, Frank Dunham and Christian Peregrim, a private citizen from New Jersey, were dismissed. Neither Dunham nor Peregrim had a significant relationship with the detainee, and Hamdi's father plainly did. *Id.* at 606.

had not shown proper deference to the government's legitimate security and intelligence interests. We did not order the petition dismissed outright, however, noting our reluctance to "embrac[e] [the] sweeping proposition ... that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.* at 283. Rather, we sanctioned a limited and deferential inquiry into Hamdi's status, noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id.* (citing *Ex parte Quirin*, 317 U.S. 1, 31, 37, 63 S.Ct. 1, 87 L.Ed. 3 (1942)). We also instructed that, in conducting the inquiry, "the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 284.

Following this remand, the district court held a hearing on July 18. During this hearing, the court expressed its concern over possible violations of Hamdi's rights as an American citizen. The court also questioned the government's most basic contentions regarding the ongoing hostilities, asking "with whom is the war I should suggest that we're fighting?" and "will the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or the citizens of the United States of America?" The court directed that "[a]ll of these [answers should] be provided in the answer that the government is to file to the petition" and directed the United States to file such a response to Hamdi's petition by July 25.

On July 25, the government filed a response to, and motion to dismiss, the petition for a writ of habeas corpus. Attached to its response was an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, which confirms the material factual allegations in Hamdi's petition—specifically, that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign, designated an "enemy combatant" by our Government, and ultimately transferred to the Norfolk Naval Brig for detention. Thus, it is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. It is further undisputed that the executive branch has classified him as an enemy combatant.

In addition to stating that Hamdi has been classified as an enemy combatant, the Mobbs declaration went on further to describe what the government contends were the circumstances surrounding Hamdi's seizure, his transfer to United States custody, and his placement in the Norfolk Naval Brig. According to Mobbs, the military determined that Hamdi "traveled to Afghanistan in approximately July or August of 2001" and proceeded to "affiliate[ ] with a Taliban military unit and receive[ ] weapons training." While serving with the Taliban in the wake of September 11, he was captured when his Taliban unit surrendered to Northern Alliance forces with which it had been engaged in battle. He was in possession of an AK–47 rifle at the time of surrender. Hamdi was then transported with his unit from Konduz, Afghanistan to the Northern Alliance prison in Mazar-e-Sharif, Afghanistan and, after a prison uprising there, to a prison at Sheberghan, Afghanistan. Hamdi was next transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, interviews with Hamdi confirmed the details of his capture and his status as an enemy combatant.





In keeping with our earlier instruction that the district court should proceed cautiously in reviewing military decisions reached during sanctioned military operations, we directed the district court to first "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Following this order, the district court held a hearing on August 13 to review the sufficiency of the Mobbs declaration.

During this hearing, the district court recognized that "the government is entitled to considerable deference in detention decisions during hostilities." The court also noted that it did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." Despite these observations, however, the court asserted that it was "challenging everything in the Mobbs' declaration" and that it intended to "pick it apart" "piece by piece." The court repeatedly referred to information it felt was missing from the declaration, asking "Is there anything in here that said Hamdi ever fired a weapon?" The court questioned whether Mr. Mobbs was even a government employee and intimated that the government was possibly hiding disadvantageous information from the court.

The district court filed an opinion on August 16, finding that the Mobbs declaration "falls far short" of supporting Hamdi's detention. The court ordered the government to turn over, among other things, copies of Hamdi's statements and the notes taken from any interviews with him; the names and addresses of all interrogators who have questioned Hamdi; statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender; and a list of the date of Hamdi's capture and all of the dates and locations of his subsequent detention.

Upon the Government's motion to certify the August 16 production order for immediate appeal, the district court certified the following question: "Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?" We then granted the Government's petition for interlocutory review pursuant to 28 U.S.C.A. § 1292(b). In so doing, we noted that "this court 'may address any issue fairly included within the certified order because it is the order that is appealable, and not the controlling question identified by the district court.'" *Hamdi v. Rumsfeld*, No. 02-7338 (4th Cir. Sept. 12, 2002) (order granting petition for interlocutory review) (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996)).

## II.

Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations. This dual status—that of American citizen and that of alleged enemy combatant—raises important questions about the role of the courts in times of war.

### A.

[1] The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme. "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25, 63 S.Ct. 1, 87 L.Ed. 3 (1942). Article I, section 8 grants Congress the power to "provide for the common Defence and general Welfare of the United States ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Cap-

tures on Land and Water; To raise and support armies . . . [and] To provide and maintain a navy." Article II, section 2 declares that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."

[2–4] The war powers thus invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Quirin*, 317 U.S. at 26, 63 S.Ct. 1. These powers include the authority to detain those captured in armed struggle. *Hamdi II*, 296 F.3d at 281–82.[3] These powers likewise extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, *see Ludecke v. Watkins*, 335 U.S. 160, 173, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948), and to confiscate or destroy enemy property, *see Juragua Iron Co. v. United States*, 212 U.S. 297, 306, 29 S.Ct. 385, 53 L.Ed. 520 (1909).

Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. "In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi II*, 296 F.3d at 281.

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the war-making powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981).

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991). Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

3. Persons captured during wartime are often referred to as "enemy combatants." While the designation of Hamdi as an "enemy combatant" has aroused controversy, the term is one that has been used by the Supreme Court many times. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341, 355, 72 S.Ct. 699, 96 L.Ed. 988 (1952); *In re Yamashita*, 327 U.S. 1, 7, 66 S.Ct. 340, 90 L.Ed. 499 (1946); *Quirin*, 317 U.S. at 31, 63 S.Ct. 1.





These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the "unconventional aspects of the present struggle do not make its stakes any less grave." *Hamdi II*, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the "political branches are best positioned to comprehend this global war in its full context," *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

B.

[5] Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. The Bill of Rights which Hamdi invokes in his petition is as much an instrument of mutual respect and tolerance as the Fourteenth Amendment is. It applies to American citizens regardless of race, color, or creed. And as we become a more diverse nation, the Bill of Rights may become even more a lens through which we recognize ourselves. To deprive any American citizen of its protections is not a step that any court would casually take.

Drawing on the Bill of Rights' historic guarantees, the judiciary plays its distinctive role in our constitutional structure when it reviews the detention of American citizens by their own government. Indeed, if due process means anything, it means that the courts must defend the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Powell v. Alabama*, 287 U.S. 45, 67, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (internal quotation marks omitted). The Constitution is suffused with concern about how the state will wield its awesome power of forcible restraint. And this preoccupation was not accidental. Our forbears recognized that the power to detain could easily become destructive "if exerted without check or control" by an unrestrained executive free to "imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." 4 W. Blackstone, *Commentaries on the Laws of England* 349–50 (Cooley ed. 1899) (quoted in *Duncan v. Louisiana*, 391 U.S. 145, 151, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)).

[6, 7] The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. The Founders "foresaw that troublous times would arise, when rulers and people would . . . seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120, 18 L.Ed. 281 (1866). While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review. *See Hamdi II*, 296 F.3d at 283.

[8] It is significant, moreover, that the form of relief sought by Hamdi is a writ of habeas corpus. In war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions. As early as 1789, Congress reaffirmed the courts' common law authority to review detentions of federal prisoners, giving its explicit blessing to the judiciary's power to "grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment" for federal detainees. Act of

Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81–82. While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.

C.

As the foregoing discussion reveals, the tensions within this case are significant. Such circumstances should counsel caution on the part of any court. Given the concerns discussed in the preceding sections, any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. *See, e.g., Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y.2002). We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.

[9] The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain. For there is a "well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, [and] enemy belligerents, prisoners of war, [and] others charged with violating the laws of war." *Duncan v. Kahanamoku*, 327 U.S. 304, 313–14, 66 S.Ct. 606, 90 L.Ed. 688 (1946) (footnotes omitted). As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks. *Hamdi II*, 296 F.3d at 283.

[10] In this regard, it is relevant that the detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front...." *In re Territo*, 156 F.2d 142, 145 (9th Cir.1946). In this respect, "captivity is neither a punishment nor an act of vengeance," but rather "a simple war measure." W. Winthrop, *Military Law and Precedents* 788 (2d ed.1920). And the precautionary measure of disarming hostile forces for the duration of a conflict is routinely accomplished through detention rather than the initiation of criminal charges. To require otherwise would impose a singular burden upon our nation's conduct of war.

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. This burden would not be inconsiderable and would run the risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict. *Hamdi II*, 296 F.3d at 283–84. As the Supreme Court has recognized, "[i]t would be difficult to devise more effective fettering of a





field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 779, 70 S.Ct. 936, 94 L.Ed. 1255 (1950).[4]

[11] The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II. As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability. To the contrary, the Supreme Court has said that "[i]n adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny ... lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). If anything, separation of powers bears renewed relevance to a struggle whose unforeseeable dangers may demand significant actions to protect untold thousands of American lives.

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of warmaking authority conferred by the Constitution and invoked by Congress and the executive branch.

III.

After the district court issued its August 16 production order, it granted respondent's motion for an interlocutory appeal of that order. The following question was certified for our review:

> Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

[12] As the Supreme Court has made clear, we are not limited to this single question. Rather, an appellate court may address any issue fairly included within the certified order, because "it is the *order* that is appealable, and not the controlling question identified by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (internal quotation marks omitted).

[13] On this appeal, it is argued that Hamdi's detention is invalid even if the government's assertions were entirely accurate. If that were clearly the case, there would be no need for further discovery such as that detailed in the August 16 production order, because Hamdi's detention would be invalid for reasons beyond the scope of any factual dispute. Indeed, any inquiry into the August 16 production order or any discussion of the certified question would be unnecessary, because

4. The government has contended that appointment of counsel for enemy combatants in the absence of charges would interfere with a third detention interest, that of gathering intelligence, by establishing an adversary relationship with the captor from the outset. *See Hamdi II*, 296 F.3d at 282 (expressing concern that the June 11 order of the district court "does not consider what effect petitioner's unmonitored access to counsel might have upon the government's ongoing gathering of intelligence"). That issue, however, is not presented in this appeal.

neither could suffice to justify a detention that, as a threshold matter, was otherwise unlawful. Moreover, the burden of the August 16 order would necessarily outweigh any benefits if, quite independent of the disputed factual issues, Hamdi were already entitled to relief. *See* Fed. R. Civ. Proc. 26(b)(1)-(2). For that reason, any purely legal challenges to Hamdi's detention are fairly includable within the scope of the certified order. *See Juzwin v. Asbestos Corp.*, 900 F.2d 686, 692 (3d Cir. 1990) (stating that, on § 1292(b) review of an order denying a dispositive motion, an appellate court is "free to consider all grounds advanced in support of the grant of [the motion] and all grounds suggested for sustaining its denial" (internal quotation marks omitted)).

[14] In this vein, Hamdi and amici have in fact pressed two purely legal grounds for relief: 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention. We now address them both.[5]

A.

18 U.S.C. § 4001 regulates the detentions of United States citizens. It states in full:

> (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> (b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended[,] and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. § 4001 (2002). Hamdi argues that there is no congressional sanction for his incarceration and that § 4001(a) therefore prohibits his continued detention. We find this contention unpersuasive.

[15] Even if Hamdi were right that § 4001(a) requires Congressional authorization of his detention, Congress has, in the wake of the September 11 terrorist attacks, authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001) (emphasis added). As noted above, capturing and detaining enemy combatants is an inherent part of warfare; the "necessary and appropriate force" referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops. Furthermore, Congress has specifically authorized the expenditure of funds for "the maintenance, pay, and allowances of prisoners of war [and] other persons in the custody of the [military] whose status is determined ... to be similar to prisoners of war." 10 U.S.C. § 956(5) (2002). It is difficult if not impossible to understand how Congress could make appropriations for the detention of persons "similar to prisoners of war" without also authorizing their detention in the first instance.

[16] Any alternative construction of these enactments would be fraught with difficulty. As noted above, the detention of enemy combatants serves critical functions. Moreover, it has been clear since at least 1942 that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37, 63 S.Ct. 1. If Congress had intended to override this well-established precedent and provide American belligerents some immunity from capture and detention, it surely would have made its intentions explicit.

It is likewise significant that § 4001(a) functioned principally to repeal the Emergency Detention Act. That statute had provided for the preventive "apprehension and detention" of individuals inside the United States "deemed likely to engage in espionage or sabotage" during "internal security emergencies." H.R. Rep. 92–116, at 2 (Apr. 6, 1971). Proponents of the repeal were concerned that the Emergency Detention Act might, inter alia, "permit[ ] a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II." *Id.* There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is. We therefore reject Hamdi's contention that § 4001(a) bars his detention.

B.

[17] Hamdi and amici also contend that Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[18, 19] This argument falters also because the Geneva Convention is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir.1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." *Id.* at art. 132; *cf. id.* at arts. 129–30 (instructing signatories to enact legislation providing for criminal sanction of "persons committing ... grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries." *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir.1978) (applying identical enforcement provisions from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2,

5. We reject at the outset one other claim that Hamdi has advanced in abbreviated form. He asserts that our approval of his continued detention means that the writ of habeas corpus has been unconstitutionally suspended. *See* U.S. Const. art. I, § 9. We find this unconvincing; the fact that we have not ordered the relief Hamdi requests is hardly equivalent to a suspension of the writ.

1956, 6 U.S.T. 3516, 75 U.N.T.S. 287); *see also Holmes v. Laird*, 459 F.2d 1211, 1222 (D.C.Cir.1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial").

Hamdi provides no reason to conclude that 28 U.S.C. § 2241 makes these diplomatically-focused rights enforceable by a private right of petition. Indeed, it would make little practical sense for § 2241 to have done so, since we would have thereby imposed on the United States a mechanism of enforceability that might not find an analogue in any other nation. This is not to say, of course, that the Geneva Convention is meaningless. Rather, its values are vindicated by diplomatic means and reciprocity, as specifically contemplated by Article 132. There is a powerful and self-regulating national interest in observing the strictures of the Convention, because prisoners are taken by both sides of any conflict. This is the very essence of reciprocity and, as the drafters of the Convention apparently decided, the most appropriate basis for ensuring compliance. As the Court in *Eisentrager* observed about the predecessor to the current Geneva Convention, "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities." 339 U.S. at 789 n. 14, 70 S.Ct. 936.

[20] Even if Article 5 were somehow self-executing, there are questions about how it would apply to Hamdi's case. In particular, it is anything but clear that the "competent tribunal" which would determine Hamdi's status would be an Article III court. Every country has different tribunals, and there is no indication that the Geneva Convention was intended to impose a single adjudicatory paradigm upon its signatories. Moreover, Hamdi's argument begs the question of what kind of status determination is necessary under Article 5 and how extensive it should be. Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful. *Quirin*, 317 U.S. at 31, 63 S.Ct. 1. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. *Id.* The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him. The Geneva Convention certainly does not require such treatment.

For all these reasons, we hold that there is no purely legal barrier to Hamdi's detention. We now turn our attention to the question of whether the August 16 order was proper on its own terms.

## IV.

[21] As we will discuss below, we conclude that Hamdi's petition fails as a matter of law. It follows that the government should not be compelled to produce the materials described in the district court's August 16 order.

We also note that the order, if enforced, would present formidable practical difficulties. The district court indicated that its production request might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status. The court plainly did not preclude making further production demands upon the government, even suggesting that it might "bring Hamdi before [the court] to inquire about [his] statements."





Although the district court did not have "any doubts [that Hamdi] had a firearm" or that "he went to Afghanistan to be with the Taliban," the court ordered the government to submit to the court for in camera, ex parte review: (1) "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country"; (2) "[a] list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews"; (3) "[c]opies of any statements by members of the Northern Alliance" regarding Hamdi's surrender; (4) "[a] list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention"; (5) "[t]he name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant"; (6) "[t]he name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station"; and (7) "the screening criteria utilized to determine the status of Hamdi." The court's order allows the government to redact "intelligence matters" from its responses, but only to the extent that those intelligence matters are outside the scope of inquiry into Hamdi's legal status.

Hamdi argues vigorously that this order should be affirmed. Because of the alleged "breadth with which Respondents construe their authority to imprison American citizens whom they consider to be enemy combatants," Br. of the Petitioners/Appellees at 27, Hamdi argues we must allow the district court to subject the government's classification of him to a searching review. While the ordinary § 2241 proceeding naturally contemplates the prospect of factual development, *see* 28 U.S.C. §§ 2243, 2246, such an observation only begs the basic question in this case—whether further factual exploration would bring an Article III court into conflict with the warmaking powers of Article I and II. Here, the specific interests asserted by the government flow directly from the warmaking powers and are intimately connected to them. Whatever the general force of these interests (which we discussed extensively above), they are most directly implicated by captures in a zone of active combat operations.

A review of the court's August 16 order reveals the risk of "stand[ing] the warmaking powers of Articles I and II on their heads," *Hamdi II*, 296 F.3d at 284. The district court, for example, ordered the government to produce all Hamdi's statements and notes from interviews. Yet it is precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field. The risk created by this order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role.

The district court further ordered the government to produce a list of all interrogators who have questioned Hamdi, including their names and addresses and the dates of the interviews, copies of any statements by members of the Northern Alliance regarding Hamdi's surrender, and a list that includes the date of Hamdi's capture and all the dates and locations of his subsequent detention. Once again, however, litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case. Complicating the matter even further is

the fact that Hamdi was originally captured by Northern Alliance forces, with whom American forces were generally allied. The district court's insistence that statements by Northern Alliance members be produced cannot help but place a strain on multilateral efforts during wartime. The court also expressed concern in its order that the Northern Alliance did not "identify the unit [to which Hamdi was affiliated]," "where or by whom [Hamdi] received weapons training or the nature and extent thereof," or "who commanded the unit or the type of garb or uniform Hamdi may have worn. . . ." In demanding such detail, the district court would have the United States military instruct not only its own personnel, but also its allies, on precise observations they must make and record during a battlefield capture.

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

For the foregoing reasons, the court's August 16 production request cannot stand.

V.

The question remains, however, whether Hamdi's petition must be remanded for further proceedings or dismissed.

Hamdi's American citizenship has entitled him to file a petition for a writ of habeas corpus in a civilian court to challenge his detention, including the military's determination that he is an "enemy combatant" subject to detention during the ongoing hostilities. Thus, as with all habeas actions, we begin by examining the precise allegations presented to us by the respective parties. In this case, there are two allegations that are crucial to our analysis. First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan, a country in which hostilities were authorized and ongoing at the time of the seizure, but that his continued detention in this country without the full panoply of constitutional protections is unlawful. Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detention, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Generally speaking, in order to fulfill our responsibilities under Article III to review a petitioner's allegation that he is being detained by American authorities in violation of the rights afforded him under the United States Constitution, we must first determine the source of the authority for the executive to detain the individual. Once the source of the authority is identified, we then look at the justification given to determine whether it constitutes a legitimate exercise of that authority.

A.

[22, 23] Here the government has identified the source of the authority to detain Hamdi as originating in Article II, Section 2 of the Constitution, wherein the President is given the war power. We have already emphasized that the standard of review of enemy combatant detentions





must be a deferential one when the detainee was captured abroad in a zone of combat operations. The President "is best prepared to exercise the military judgment attending the capture of alleged combatants." *Hamdi II*, 296 F.3d at 283. Thus, in *Quirin*, the Supreme Court stated in no uncertain terms that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin*, 317 U.S. at 25, 63 S.Ct. 1.

[24] This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers. It does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power. Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority. Indeed, in this case, the government has voluntarily submitted—and urged us to review—an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, describing what the government contends were the circumstances leading to Hamdi's designation as an enemy combatant under Article II's war power.

[25] The Mobbs affidavit consists of two pages and nine paragraphs in which Mobbs states that he was "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them." In the affidavit, Mobbs avers that Hamdi entered Afghanistan in July or August of 2001 and affiliated with a Taliban military unit. Hamdi received weapons training from the Taliban and remained with his military unit until his surrender to Northern Alliance forces in late 2001. At the time of his capture, Hamdi was in possession of an AK–47 rifle. After his capture, Hamdi was transferred first from Konduz, Afghanistan to the prison in Mazar-e-Sharif, and then to a prison in Sheberghan, Afghanistan where he was questioned by a United States interrogation team. This interrogation team determined that Hamdi met "the criteria for enemy combatants over whom the United States was taking control." Hamdi was then transported to the U.S. short term detention facility in Kandahar, and then transferred again to Guantanamo Bay and eventually to the Norfolk Naval Brig. According to Mobbs, a subsequent interview with Hamdi confirmed the details of his capture and his status as an enemy combatant.

The district court approached the Mobbs declaration by examining it line by line, faulting it for not providing information about whether Hamdi had ever fired a weapon, the formal title of the Taliban military unit Hamdi was with when he surrendered, the exact composition of the U.S. interrogation team that interviewed Hamdi in Sheberghan, and even the distinguishing characteristics between a Northern Alliance miliary unit and a Taliban military unit. Concluding that the factual allegations were insufficient to support the government's assertion of the power to detain Hamdi under the war power, the court then ordered the production of the numerous additional materials outlined

previously. We think this inquiry went far beyond the acceptable scope of review.

To be sure, a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency, as the district court attempted to do. The court's approach, however, had a signal flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its power to detain under the war powers of Article II. *See Eisentrager*, 339 U.S. at 793, 70 S.Ct. 936 (Black, J., dissenting) ("[I]t is no 'crime' to be a soldier."); *cf. In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (explaining that elevated burden of proof applies in criminal cases because of consequences of conviction, including social stigma). To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.

The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake. Yet these characteristics of warfare have been with us through the centuries and have never been thought sufficient to justify active judicial supervision of combat operations overseas. To inquire, for example, whether Hamdi actually fired his weapon is to demand a clarity from battle that often is not there. The district court, after reviewing the Mobbs affidavit, did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." To delve further into Hamdi's status and capture would require us to step so far out of our role as judges that we would abandon the distinctive deference that animates this area of law.

For these reasons, and because Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and, as discussed elsewhere, that it is consistent with the Constitution and laws of Congress. *See Quirin*, 317 U.S. at 25, 63 S.Ct. 1. Asking the executive to provide more detailed factual assertions would be to wade further into the conduct of war than we consider appropriate and is unnecessary to a meaningful judicial review of this question.

B.

[26] We turn then to the question of whether, because he is an American citizen currently detained on American soil by the military, Hamdi can be heard in an Article III court to rebut the factual assertions that were submitted to support the "enemy combatant" designation. We hold that no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.

In support of its contention that no further factual inquiry is appropriate, the government has argued that a "some evidence" standard should govern the adjudication of claims brought by habeas petitioners in areas where the executive has primary responsibility. That standard has indeed been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 306, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (describing historical practice under which, so long as "there was some evidence to support" a deportation order, habeas courts would not "review factual determinations made by the Executive"); *Eagles v. Samuels*, 329 U.S. 304, 312, 67 S.Ct. 313, 91 L.Ed. 308 (1946); *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 69 L.Ed. 970 (1925). In each of these cases, the Court indicated that the role of the writ is not to correct "mere error" in the executive's exercise of a discretionary power, but rather to check the executive branch if it asserts a "power to act beyond the authority granted." *Eagles*, 329 U.S. at 311–12, 67 S.Ct. 313. Thus, the government asserts, the role of a habeas court is not to reconsider the executive's decision, but rather only to confirm that "there was *some* basis for the challenged executive determination." Br. for Respondents–Appellants at 29. Once that determination is made, the government further asserts, the detainee may not offer any rebuttal evidence and no further factual inquiry is allowed.





It is not necessary for us to decide whether the "some evidence" standard is the correct one to be applied in this case because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi's capture would be inappropriate.

1.

[27–29] As we have emphasized throughout these appeals, we cannot set aside executive decisions to detain enemy combatants "without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin*, 317 U.S. at 25, 63 S.Ct. 1. We cannot stress too often the constitutional implications presented on the face of Hamdi's petition. The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not. Any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant, for example, would require courts to consider, first, what activities the detainee was engaged in during the period leading up to his seizure and, second, whether those activities rendered him a combatant or not. The first question is factual and, were we called upon to delve into it, would likely entail substantial efforts to acquire evidence from distant battle zones. *See Eisentrager*, 339 U.S. at 779, 70 S.Ct. 936. The second question may require fine judgments about whether a particular activity is linked to the war efforts of a hostile power—judgments the executive branch is most competent to make.

Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution and Congressional authorization for use of military force in the wake of al Qaida's attack. *Quirin*, 317 U.S. at 25, 63 S.Ct. 1. Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts autho-

rized by Congress and undertaken by the executive branch.

2.

[30] Hamdi contends that, although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant.

Indeed, this same issue arose in *Quirin*. In that case, petitioners were German agents who, after the declaration of war between the United States and the German Reich, were trained at a German sabotage school where they "were instructed in the use of explosives and in methods of secret writing." *Quirin*, 317 U.S. at 21, 63 S.Ct. 1. The petitioners then journeyed by submarine to the beaches of New York and Florida, carrying large quantities of explosives and other sabotage devices. All of them were apprehended by FBI agents, who subsequently learned of their mission to destroy war industries and facilities in the United States. All of the petitioners were born in Germany but had lived in the United States at some point. One petitioner claimed American citizenship by virtue of the naturalization of his parents during his youth. The Court, however, did not need to determine his citizenship because it held that the due process guarantees of the Fifth and Sixth Amendments were inapplicable in any event. It noted that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful." *Id.* at 37, 63 S.Ct. 1. The petitioner who alleged American citizenship was treated identically to the other German saboteurs.

[31] The *Quirin* principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.

3.

[32] Similarly, we reject Hamdi's argument that even if his initial detention in Afghanistan was lawful, his continuing detention on American soil is not. Specifically, Hamdi contends that his petition does not implicate military concerns because "the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas on the basis of caution rather than accuracy." Br. of the Petitioners/Appellees at 44. But the fact that Hamdi is presently being detained in the United States—as opposed to somewhere overseas—does not affect the legal implications of his status as an enemy combatant. For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another. It is not clear why the United States should be precluded from exercising its discretion to move a detainee to a site within this country, nor do we see what purpose would be served by second guessing the military's decision with respect to the locus of detention.





4.

To conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in an zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

C.

[33] Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end. In his brief, Hamdi alleges that the government "confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom Respondents refuse to recognize as 'belligerents' under international law." Id. at 53–54. Whether the timing of a cessation of hostilities is justiciable is far from clear. *See Ludecke*, 335 U.S. at 169, 68 S.Ct. 1429 ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled."). The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them. *See United States v. The Three Friends*, 166 U.S. 1, 63, 17 S.Ct. 495, 41 L.Ed. 897 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."). In any case, we need not reach this issue here. The government notes that American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.

VI.

It is important to emphasize that we are not placing our imprimatur upon a new day of executive detentions. We earlier rejected the summary embrace of "a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi II*, 296 F.3d at 283. But, Hamdi is not "any American citizen alleged to be an enemy combatant" by the government; he is an American citizen captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces.

Cases such as Hamdi's raise serious questions which the courts will continue to treat as such. The nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot thrive. The judiciary was meant to respect the delicacy of the balance, and we have endeavored to do so.

The events of September 11 have left their indelible mark. It is not wrong even in the dry annals of judicial opinion to mourn those who lost their lives that terrible day. Yet we speak in the end not from sorrow or anger, but from the conviction that separation of powers takes on special significance when the nation itself comes under attack. Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framer's scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one. That is why, for reasons stated, the judgment must be reversed and the petition dismissed. It is so ordered.

**John Dennis DANIELS, Petitioner-Appellant,**

**v.**

**R.C. LEE, Warden, Central Prison, Raleigh, North Carolina, Respondent-Appellee.**

**No. 02-9.**

United States Court of Appeals, Fourth Circuit.

Argued Oct. 29, 2002.

Decided Jan. 10, 2003.

State prisoner filed petition for writ of habeas corpus, challenging conviction of capital murder and resulting death sentence, affirmed at 337 N.C. 243, 446 S.E.2d 298. The United States District Court for the Western District of North Carolina, Graham C. Mullen, Chief Judge, granted summary judgment in favor of state, and denied petitioner's motion for reconsideration. Petitioner sought a certificate of appealability (COA). The Court of Appeals, King, Circuit Judge, held that: (1) petitioner failed to show cause or prejudice to excuse procedural default of claim that prosecutor made a constitutionally defective closing argument to jury during sentencing phase of trial; (2) petitioner's constitutional right to compulsory process was not violated; (3) petitioner's right of self-representation was not infringed; (4) petitioner failed to rebut presumption of correctness as to state court's finding that he was aware of his right to testify at sentencing phase, and that he had waived that right; (5) petitioner was not denied effective assistance of counsel; and (6) petitioner failed to make a substantial showing of the denial of a constitutional right, as required to obtain a COA.

Certificate of appealability denied.

**1. Habeas Corpus ⇐442**

Even if the state court's determination that there is no constitutional error was "contrary to" or "an unreasonable application of" Supreme Court precedent, federal courts are not permitted to grant habeas corpus relief unless they are convinced that the error had a substantial and injurious effect or influence in determining the jury's verdict. 28 U.S.C.A. § 2254(d)(2).

**2. Habeas Corpus ⇐818**

To make a substantial showing of the denial of a constitutional right, as required to obtain a certificate of appealability (COA), a habeas petitioner must demon-





*University of Scranton*, 700 A.2d 979, 988 (Pa.Super.Ct.1997); *Corrigan v. Methodist Hosp.*, 853 F.Supp. 832, 837 (E.D.Pa.1994) (applying Pennsylvania law). Plaintiff has failed to show any intent to injure Mrs. Labelle on the part of Philip Morris, and therefore summary judgment is proper as to Plaintiff's civil conspiracy claim. *See Corrigan*, 853 F.Supp. at 837 (holding that requisite malice cannot be inferred from the mere fact that defendants stood to gain financially from their allegedly harmful and illegal actions).

### *IV. CONCLUSION*

It is, therefore.

**ORDERED**, for the foregoing reasons that Defendant Philip Morris' Motion for Summary Judgment is **GRANTED** as to all of Plaintiff's claims.

**AND IT IS SO ORDERED.**

**Yaser Esam HAMDI, and Esam Fouad Hamdi, As Next Friend of Yaser Esam Hamdi, Petitioners,**

**v.**

**Donald RUMSFELD, and Commander W.R. Paulette, Respondents.**

**No. 2:02-CV-439.**

United States District Court, E.D. Virginia, Norfolk Division.

Aug. 16, 2002.

Father of military detainee, who was American citizen captured as alleged enemy combatant during military operations in Afghanistan, petitioned as next friend for writ of habeas corpus. The United States District Court for the Eastern District of Virginia appointed counsel and ordered government to allow counsel unmonitored access to detainee. Government appealed. The Court of Appeals, 296 F.3d 278, reversed and remanded. On remand, the District Court, Doumar, Senior District Judge, held that: (1) detainee was entitled to due process of law, and (2) government's declaration was insufficient, standing alone, to establish that continuing military detention did not violate detainee's due process rights.

Ordered accordingly.

Order reversed, 316 F.3d 450.

**1. Constitutional Law ⇐72**

Deference afforded by judiciary to the President of the United States when exercising his authority as Commander in Chief is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations, and extends to military designations of individuals as enemy combatants.

**2. Constitutional Law ⇐72**

Although the President of the United States is entitled to deference regarding military designations of individuals made pursuant to the President's exercise of authority as Commander in Chief, the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens.

**3. Constitutional Law ⇐252**

Military detainee, who was American citizen captured as alleged enemy combatant during military operations in Afghanistan, was entitled to due process of law pursuant to Fifth Amendment. U.S.C.A. Const.Amend. 5.

4. Constitutional Law ⇐255(2)
War and National Emergency ⇐11

Declaration submitted by government was insufficient, standing alone, to establish that government's continuing military detention of American citizen who was captured as alleged enemy combatant during military operations in Afghanistan, and who was being held indefinitely, on United States soil, in solitary confinement, and without access to counsel, did not violate detainee's due process rights; declaration did not address declarant's authority to conduct review and make declarations on government's behalf regarding detainee's classification as enemy combatant, permit determination as to constitutionality of screening criteria used in classifying detainee and making transfer decisions respecting detainee, or adequately establish factual basis underlying classification determination. U.S.C.A. Const.Amend. 5.

5. Arrest ⇐70(2)

Confinement for 48 hours triggers arrestee's right to a preliminary hearing.

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Larry W. Shelton, Office of the Federal Public Defender, Norfolk, VA, Frank W. Dunham, Jr., Office of the Public Defender, Richmond, VA, for Yaser Esam Hamdi.

Esam Fouad Hamdi, Jubail, Saudi Arabia, pro se.

Lawrence Richard Leonard, Office of United States Attorney, Norfolk, VA, Gregory George Garre, U.S. Department of Justice Office of the Solicitor General, Washington, DC, for Respondent.

***ORDER***

DOUMAR, District Judge.

This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer. Despite the fact that Yaser Esam Hamdi ("Hamdi") has not been charged with an offense nor provided access to counsel, the Respondents contend that his present detention is lawful because he has been classified as an enemy combatant. Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ("Resp.Brief"), at 9. In denying the Respondents' Motion to Dismiss, the Court of Appeals for the Fourth Circuit rejected the Respondents' contention that the government's determination of Hamdi's status was beyond judicial review stating, "[i]n dismissing...with no *meaningful judicial review*, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir.2002) (emphasis added).

In this Court's hearing on the matter on August 13, 2002, the Respondents conceded that their determination of Hamdi's status was subject to judicial review. However, the Respondents argued that the Mobbs Declaration that it attached to its Response, in and of itself with no further evidence of any kind, was a sufficient factual basis to provide this Court with information adequate to dismiss the writ of habeas corpus. For the reasons stated below, this Court finds the Mobbs Declaration insufficient and once again **ORDERS** the Respondents to submit to the Court the materials previously requested in its July 31, 2002, Order, together with the screening criteria utilized to determine the status of Hamdi with the name(s) and address(es) of the persons who made the determination. The Respondents' Motion for Relief from this Court's production order of July 31, 2002, filed August 5, 2002, is **DENIED**. This Court is highly cognizant of the Respondents' concerns regarding any national security implications of the requested materials. The Court reiterates that the materials are to be produced solely for in camera review, *ex parte*, by the Court, in order to insure that the documents will in no possible way affect national security. The Court **ORDERS** that the sealed documents be produced by 4:30 p.m. on Wednesday, August 21, 2002, to this Division of this Court for the Judge's in camera review.





*Background*

On September 11, 2001, the al Qaida terrorist network launched an attack on the United States resulting in approximately 3,000 fatalities. Seven days later, Congress responded by authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (2001). The President subsequently ordered United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime that was supporting it. In late 2001, the Respondents contend that Yaser Esam Hamdi surrendered to Northern Alliance forces that were acting in conjunction with American forces during these military operations.

Although the circumstances of Hamdi's surrender and detention are anything but clear, he was apparently classified as an "enemy combatant" that met certain "screening criteria" [1] and turned over to U.S. military control. Hamdi was transferred to Camp X-Ray at the Naval Base in Guantanamo Bay, Cuba together with hundreds of other detainees of like circumstances. It appears that the government, realizing that Hamdi was born in the United States, looked upon him somewhat differently. For reasons that are still unclear, Hamdi was subsequently transferred to the Norfolk Naval Station Brig, Norfolk, Virginia, U.S.A. in April 2002.

On May 10, 2002, the Federal Public Defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition, naming as petitioners both Hamdi and himself as Hamdi's next friend. After holding a hearing on May 29, 2002, this Court concluded that the habeas corpus petition was properly filed and ordered that Hamdi be allowed to meet with the Federal Public Defender on June 1, 2002. On May 31, 2002, the Respondents filed a motion in the Court of Appeals for the Fourth Circuit for a stay pending appeal of this Court's access order on the grounds that there was an insufficient relationship between Hamdi and the Federal Public Defender. The Court of Appeals granted the Respondents' Motion.

While the Federal Public Defender's petition was submitted to the appeals court, Esam Fouad Hamdi, the detainee's father, filed a separate petition for a writ of habeas corpus naming as petitioners both Yaser Esam Hamdi and himself as next friend. On June 11, 2002, this Court found that Hamdi's father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi. The Respondents then filed a motion for stay in

1. The Respondents have not produced the screening criteria to this Court and have stated that the criteria are classified. In its Response, filed on July 25, 2002, the Respondents went on to suggest that it could submit to this Court a copy of the screening criteria *ex parte* and under seal. Resp. Brief, at 3 n.1. However, in the hearing conducted by this Court on August 13, 2002, the Respondents indicated that they are now unwilling to produce any additional information.

the Court of Appeals for the Fourth Circuit pending appeal of the June 11, 2002, Order. On June 14, 2002, the Court of Appeals granted the Respondents' Motion for a stay of this Court's June 11 2002, Order and further ordered a stay of all proceedings before this Court in connection with Hamdi.

On June 26, 2002, the appellate court dismissed the petition brought by Frank Dunham finding an insufficient relationship between Mr. Dunham and the detainee. *Hamdi v. Rumsfeld*, No. 02-6827, slip op. at 2 (4th Cir. June 26, 2002). The appeals court further held that Hamdi's father had a sufficient relationship with Hamdi and had filed a valid next friend petition. *See id.* at 3 n. 1.

On July 12, 2002, the Court of Appeals ruled on the Respondents' Appeal regarding this Court's June 11, 2002, access Order. *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir.2002). In their appeal, the Respondents argued that the habeas petition should be dismissed in its entirety, or alternatively, the case should be reversed and remanded to this Court for further proceedings. The appeals court declined to dismiss the petition, finding that such dismissal would be premature. *Id.* at 282. Instead, the Court of Appeals reversed this Court's June 11, 2002, Order and remanded the case for further proceedings. *Id.* at 280. In reversing, the appellate court held that this Court failed to extend to the political branches the appropriate deference in matters of foreign policy and national security. *Id.* at 281. The appellate court then directed this Court to consider "the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.* at 282–3.

On August 8, 2002, the Court of Appeals for the Fourth Circuit dissolved its stay order of June 14, 2002. In doing so, the Appeals Court stated "that the district court may proceed in strict compliance with our July 12, 2002 decision." August 8, 2002 Order at 1. The Court of Appeals further directed this Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further." *Id.* at 280.

In response, this Court analyzed the Mobbs Declaration, considered briefs submitted from both the Respondents and the Federal Public Defender, and heard oral argument on August 13, 2002, from both sides. In strict compliance with the Court of Appeals August 8, 2002 Order, the sole purpose of the hearing was to determine whether the Mobbs Declaration, *standing alone*, was sufficient justification for a person born in the United States to be held without charges, incommunicado, in solitary confinement, and without access to counsel on U.S. soil.

*Discussion*

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Depending on Hamdi's status, the joint service regulations governing the detention of captured enemy combatants or others may also be implicated. *See* Joint Service Regulation, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997)(hereinafter Joint Service Regulation). These regulations "provide[ ] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces." *Id.* at 1. The exact legal force of these regulations is not now determined, but the regulation states that it "implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war." *Id.* It specifically lists the GPW as one of the relevant treaties in its determination of international law. *Id.* At the very least, the Joint Service Regulation illustrates the U.S. military's position regarding its obligations under the GPW. Any decision regarding the legal effect of the GPW or the Joint Regulations would be premature at this point in the proceedings as it is necessary to first develop a factual background by which Hamdi's classification may be evaluated.[2] Under the facts that the Court has before it at this time, the Respondents have not shown that the requirements of the GPW nor the Joint Service Regulations, which apply regardless of the treaty, have been complied with. In light of the cautious procedures that the Court of Appeals outlined for this Court to follow, any determination of these issues would be premature as it is necessary to first develop a factual background.

[1] The judiciary has traditionally shown "great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." *Hamdi v. Rumsfeld*, at 282. The Supreme Court has made it clear that the President is afforded deference when exercising his authority as Commander in Chief. *Ex parte Quirin*, 317 U.S. 1, 28–29, 63 S.Ct. 1, 87 L.Ed. 3 (1942). Deference is proper because of the Executive's special competency, and constitutional responsibility, over the conduct of overseas military operations. Deference to the President is particularly appropriate when Congress has authorized the Executive to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Authorization for Use of Military Force, Pub.L. No. 107–40, 115 Stat. 224 (2001). This deference extends to military designations of individuals as enemy combatants. *Hamdi v. Rumsfeld*, 296 F.3d at 282.

2. The Joint Service Regulations as well as the treaty indicate that where a detainee's status may be in doubt that a military tribunal, appointed by the general courts-martial convening authority, must determine whether the detainee is a Prisoner of War. *See* Joint Service Regulation 1–6(b)("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists."); Joint Service Regulation Glossary ("Other Detainee—Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority."); GPW Art. 5("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.")(the GPW does not allude to general courts-martial convening authority).

[2] While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties guaranteed by the United States Constitution, of American citizens. The scope of "any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." *Id.* at 282. The standard of judicial inquiry must also recognize that the "concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart . . . It would indeed by ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

[3] The Due Process Clause of the Fifth Amendment prohibits the government from "depriving" any person of liberty "without due process of law." U.S. Const. Amend. V. While Petitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge, Petitioners argue that the continuing indefinite imprisonment on U.S. soil, in solitary confinement, and without access to counsel violates the detainee's Fifth Amendment rights. Petitioners' Traverse and Response to Respondents' Motion to Dismiss ("Pet.Brief"), at 20. For its part, the Respondents argue that Hamdi's due process rights have not been violated because of the "historical unavailability of any right to prompt charges or counsel for those held as enemy combatants." Resp. Brief, at 10. When asked during the August 13, 2002, hearing what, if any, constitutional protections Hamdi was entitled to, counsel for the Respondents responded that the Constitution applied to the same extent as "it did to the individual who was alleged to be an American citizen in the *Quirin* case." August 13, 2002, Hr'g Tr. at 7. Upon further questioning by the court, the Respondents' counsel conceded that the individual in *Ex parte Quirin* that it referred to was afforded access to counsel and the opportunity to defend himself before a military tribunal. *Id.* It is apparent that the defendant in *Quirin* to whom the Respondents referred was provided with a significantly broader measure of due process than Hamdi has received thus far. This Court finds that Hamdi is entitled to due process of law as provided by the Fifth Amendment to the United States Constitution.

[4] The question then becomes whether the Respondents' classification of Hamdi's combatant status has violated his due process rights under the Constitution. The Respondents contend that the Mobbs Declaration is sufficient, by itself, to allow this Court to conduct a meaningful judicial review to insure that the government has not violated any of Hamdi's rights and protections. While recognizing the deference due to the Executive's decisions regarding combatant status classifications, the Court finds that a meaningful judicial review must, at a minimum, determine:

(1) Whether the government's classification of the detainee's status was determined pursuant to appropriate authority to make such determinations.

(2) Whether the screening criteria used to make and maintain the classification of an American born detainee held in the continental United States met sufficient procedural requirements as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty, or property without due process of law.

(3) On what basis has the government determined that the continuing detention of Hamdi without charges and without access to counsel serves national security.

(4) Whether the Geneva Treaty or the Joint Services Regulations required a different process.[3]

An examination of the Mobbs Declaration reveals that it falls far short of even these minimal criteria for judicial review. The Respondents produced the Mobbs Declaration as attachment 1 to its brief filed on July 25, 2002. The document is two pages long and consists of nine numbered paragraphs. The declaration is signed by a Michael H. Mobbs and dated July 24, 2002. A thorough examination of the Mobbs Declaration reveals that it leads to more questions than it answers.

[5] The declaration fails to address the nature and authority of Mr. Mobbs to review and make declarations on behalf of the Executive regarding Hamdi's classification. Paragraph 1 of the Mobbs Declaration states that Mr. Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. Mobbs Decl. at 1. The declaration does not indicate what authority a "Special Advisor" has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002, hearing, when asked to explain Mr. Mobbs' authority and role in Hamdi's classification as an enemy combatant, the Respondents' counsel was unable to do so. Tr. at 10. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondents' Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi. There is a huge amount of this in legal arguments. There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges.[4] So obviously criminal charges are not contemplated.

In Paragraph 2 of the Mobbs Declaration, Mr. Mobbs claims a familiarity with the policies and procedures applicable to Hamdi's detention. He claims to have reviewed the relevant records and reports regarding Hamdi's detention and capture. Mobbs Decl. at 1. The declaration does not answer under whose authority and by what procedures Mr. Mobbs engaged in such a review. Nor does it explain whether Mr. Mobbs is responsible for supervising the classification decisions of others. These are important considerations for any meaningful judicial review because the Court must be able to determine whether the person(s) making the classification decision did so with the authority of the Executive and pursuant to the statutes,

3. Counsel for the Respondents indicate that the armed services did not have to follow the Joint Service Regulations when first taking Hamdi in custody. August 13, 2002, Hr'g Tr. 30, 31.

4. Confinement for 48 hours triggers the right to a preliminary hearing. *Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

rules, and regulations pertaining to such matters.

The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country. In paragraph 3 of the declaration, Mr. Mobbs states that Hamdi was "affiliated with a Taliban military unit and received weapons training." *Id.* The declaration makes no effort to explain what "affiliated" means nor under what criteria this "affiliation" justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of "affiliation" is necessary to warrant enemy combatant status. These are crucial determinations for purposes of judicial review. It does not say where or by whom he received weapons training or the nature and extent thereof.[5] Indeed, a close inspection of the declaration reveals that Mr. Mobbs never claims that Hamdi was fighting for the Taliban, nor that he was a member of the Taliban. Without access to the screening criteria actually used by the government in its classification decision, this Court is unable to determine whether the government has paid adequate consideration to due process rights to which Hamdi is entitled under his present detention.

In Paragraph 4 of the Mobbs Declaration, it indicates that Northern Alliance forces were engaged in battle with the Taliban. It does not say that the Taliban unit to which Hamdi was "affiliated" was ever in any battle while Hamdi's was "affiliated." *Id.* Nor does it identify the unit. Nor does it indicate who commanded the unit or the type of garb or uniform Hamdi may have worn when taken by the Northern Alliance. It further indicates after Hamdi "surrendered" that he kept his weapon.[6] He only gave up the weapon prior to being placed in prison. All the while he was under the care, custody and control of Northern Alliance forces. Whether the forces he surrendered to was led by a "war lord" or the unidentified unit to which he was "affiliated" was led by a "war lord" or whether the war lords changed sides is not set forth.

In paragraph 5 of the declaration, the U.S. interrogation team interviewed Hamdi while he was under the "Northern Alliance" control. It says that Hamdi identified himself as a Saudi citizen who had been born in the United States.[7] Mr. Mobbs claims that during the interview, Hamdi admitted that he "entered Afghanistan the previous summer to train with and, *if necessary*, fight for the Taliban." *Id.* (emphasis added). The Court notes that the declaration does not quote from this alleged admission from Hamdi, but rather appears to be paraphrased. A possible inference from Hamdi's alleged statement was that he was not fighting for the Taliban when he was surrendered to the Northern Alliance forces. It does not indicate what the "if necessary" connotes. Does it mean in self defense or did a threatened force from the Taliban make it "necessary?"

5. Did someone give him a weapon and say "here's the safety and there's the trigger?"

6. This doesn't sound like he was expected to fight or escape.

7. The regulation required such a team to determine the name, rank, date of birth, city and country of birth, name and address of next of kin, date of capture, place of capture, capturing unit, circumstances of capture, nation in whose armed services the individual is serving and much more information. Joint Services Regulation 1-7.





Paragraph 6 of the Declaration states Hamdi was originally classified as an enemy combatant by "military forces" based upon his interviews and in light of his association with the Taliban. *Id.* at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant. If it was Northern Alliance forces that originally classified him, then it is unclear how Northern Alliance forces differentiated themselves from Taliban forces during the conflict. Was there some garb of each that made identification easy to participants? Is any individual associated with or near the Taliban an "enemy combatant?"

In paragraph 7, Mr. Mobbs states that Hamdi was determined to meet the "criteria" for enemy combatants by the U.S. military screening team at the Sheberghan prison. *Id.* There is no mention of the criteria used to make such a determination.

In paragraph 8, the declaration states that "a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay." *Id.* It is unclear whether the Detainee Review and Screening Team's criteria at Kandahar was the same criteria used to make the determination regarding Hamdi's status as an enemy combatant at Sheberghan. It does not list the criteria used.

In paragraph 9, the declaration asserts that a "subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant." *Id.* at 2. Again, it appears that Mr. Mobbs is merely paraphrasing a statement supposedly made by Hamdi. Due to the ease with which such statements may be taken out of context, the Court is understandably suspicious of the Respondents' assertions regarding statements that Hamdi is alleged to have made. While it may be premature, and eventually unnecessary, for the Court to bring Hamdi before it to inquire about these statements, the Court finds that it must be provided with complete copies of any statements by Hamdi in order to appropriately conduct a judicial review of his classification. Petitioners' counsel asserted at the hearing that some of these statements were unclassified and provided by the government to counsel for John Phillip Walker Lindh in a companion case in this district.

Without access to the screening criteria and Hamdi's statements, it is impossible to evaluate whether Mr. Mobbs is correct in his assertion that Hamdi's classification as an enemy combatant is justified. The Mobbs Declaration is little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant. If the Court were to accept the Mobbs Declaration as sufficient justification for detaining Hamdi in the present circumstances, then it would in effect be abdicating any semblance of the most minimal level of judicial review. In effect, this Court would be acting as little more than a rubber-stamp. While the Respondents may very well be correct that Hamdi is appropriately classified as an enemy combatant, the Court is unwilling on the sparse facts before it to find so at this time. Obviously, the Respondents have the information as the United States military generally follows their own regulations.[8]

8. Disobedience of regulations generally results in discipline actions.

We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws. Our Constitution was the first to develop a government of checks and balances. The legislative, executive, and judicial branches each check each other. While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration. Therefore it is necessary to obtain the additional facts requested.

The Clerk of the Court is **DIRECTED** to transmit this Order via facsimile and U.S. mail to all counsel or record and to mail a copy to Yaser Esam Hamdi.

**IT IS SO ORDERED.**

**SHOOTING POINT, L.L.C., et al., Plaintiffs,**

v.

**W.M. CUMMING, Jr., John W. Wescoat, Suzanne Wescoat, John W. Wescoat, Jr., and Curtis H. Jones, Jr., Defendants.**

**No. 2:02CV193.**

United States District Court, E.D. Virginia, Norfolk Division.

Jan. 30, 2003.

Landowners sued adjoining landowners and engineer for state department of transportation under § 1983, alleging violations of their federal and constitutional rights. The District Court, 238 F.Supp.2d 729, dismissed action. On plaintiffs' motion for clarification, the District Court, Rebecca Beach Smith, J., held that plaintiffs failed to allege any abridgement of their federally-protected rights, as required to support claim for civil conspiracy under § 1983.

Ordered accordingly.

1. **Conspiracy** ⇐7.5(1)

To state claim for civil conspiracy under § 1983, plaintiff must make something more than naked assertion of conspiracy between state actor and private parties; plaintiff must show that defendants acted jointly in concert and that some overt act was done in furtherance of conspiracy which resulted in deprivation of constitutional right. 42 U.S.C.A. § 1983.

2. **Conspiracy** ⇐7.5(1)

Gist of cause of action for civil conspiracy under § 1983 is deprivation of plaintiff's constitutional right, and not the conspiracy. 42 U.S.C.A. § 1983.







United States Court of Appeals, Fourth Circuit.

Yaser Esam HAMDI; Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi, Petitioners-Appellees,

v.

Donald RUMSFELD; W.R. Paulette, Commander, Respondents-Appellants.

Ruth Wedgwood, Professor of Law, Yale University Law School, and Edward B. Burling Professor of International Law and Diplomacy, Johns Hopkins University; Samuel Estreicher, Professor of Law, New York University School of Law; Ronald Rotunda, George Mason University Foundation Professor of Law, George Mason University School of Law; Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, Catholic University; David B. Rivkin, Jr.; Lee A. Casey; Darin R. Bartram; Amici Curiae in support of Appellants.

Center For Constitutional Rights; Richard L. Abel, Connell Professor of Law, University of California at Los Angeles; William J. Aceves, Professor of Law, California Western School of Law; Bruce A. Ackerman, Sterling Professor of Law & Political Science, Yale University; Lee A. Albert, Professor of Law, University at Buffalo Law School, The State University of New York; Barbara Bader Aldave, Loran L. Stewart, Professor of Corporate Law, University of Oregon School of Law; Alicia Alvarez, Clinical Associate Professor of Law, DePaul University School of Law; Diane Marie Amann, Professor of Law, University of California, Davis, School of Law; Michelle J. Anderson, Associate Professor of Law, Villanova University School of Law; Fran Ansley, Professor of Law, University of Tennessee College of Law; Elvia R. Arriola, Associate Professor of Law, Northern Illinois University College of Law; Frank Askin, Professor of Law and Robert Knowlton Scholar, Rutgers School of Law at Newark; Milner S. Ball, Caldwell Professor of Constitutional Law, University of Georgia School of Law; Jon Bauer, Clinical Professor of Law and Director, Asylum & Human Rights Clinic University of Connecticut School of Law; Paul Schiff Berman, Associate Professor, University of Connecticut School of Law; Cynthia Bowman, Professor of Law, Northwestern University School of Law; Mark S. Brodin, Professor of Law, Boston College Law School; Bartram S. Brown, Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; Sue Bryant, Director of Clinical Education and Associate Professor of Law, CUNY School of Law; Burton Caine, Professor of Law, Temple University School of Law; Emily Calhoun, Professor of Law, University of Colorado School of Law; Anupam Chander, Acting Professor of Law, University of California, Davis, School of Law; Erwin Chemerinsky, Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California Law School; Paul G. Chevigny, Joel S. and Anne B. Ehrenkranz Professor of Law, New York University Law School; Paul Chill, Clinical Professor of Law, University of Connecticut School of Law; Gabriel J. Chin, Rufus King Professor of Law, University of Cincinnati College of Law; Carol Chomsky, Associate Professor of Law, University of Minnesota Law School; Margaret Chon, Associate Professor of Law, Seattle University School of Law; Marjorie Cohn, Associate Professor of Law, Thomas Jefferson School of Law, San Diego; Robin Morris Collin, Professor of Law, University of Oregon School of Law; Dennis E. Curtis, Clinical Professor of Law, Yale Law School; Erin Daly, Associate Professor of Law, Widener University; Michael H. Davis, Professor of Law, Cleveland State University; Michael Deutsch, Adjunct Professor of Law, Northwestern University School of Law; Laura Dickinson, Associate Professor, University of Connecticut School of Law; Robert Dinerstein, Associate Dean and Professor of Law, American University, Washington College of Law; Jane Dolkart, Associate Professor of Law, Dedman School of Law, Southern Methodist University; Sharon Dolovich, Acting Professor of Law, University of California at Los Angeles; Douglas L. Donoho, Professor of Law, Nova Southeastern University,

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Shepard Broad Law Center; Dolores Donovan, Professor of Law, University of San Francisco School of Law; Mary L. Dudziak, Judge Edward J. and Ruey L. Guirado Professor of Law and History, University of Southern California Law School; Visiting Research Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University; Pamela Edwards, Assistant Professor of Law, CUNY School of Law; Nancy Ehrenreich, Associate Professor of Law, University of Denver College of Law; Rosa Ehrenreich Brooks, Associate Professor of Law, University of Virginia School of Law; J. Soffiyah Elijah, Clinical Instructor, Criminal Justice Institute, Harvard Law School; Susan J. Feathers, Esq., Director, Public Service Program, University of Pennsylvania Law School; Marvin Fein, Associate Professor, University of Pittsburgh School of Law; Todd D. Fernow, Professor of Law, Director, Criminal Clinic, University of Connecticut School of Law; Sally Frank, Professor of Law, Drake University School of Law; Katherine Franke, Professor of Law, Columbia University; Eric M. Freedman, Professor of Law, Hofstra University School of Law; Niels W. Frenzen, Clinical Assistant Professor of Law, University of Southern California; Craig B. Futterman, Assistant Clinical Professor of Law, University of Chicago Law School; Kristin Booth Glen, Dean and Professor of Law, CUNY School of Law; Brian Glick, Associate Clinical Professor of Law, Fordham Law School; Howard A. Glickstein, Dean and Professor of Law, Touro Law School; Phyllis Goldfarb, Professor of Law, Boston College Law School; Bob Golten, Director, International Human Rights Advocacy Center, University of Denver; Carlos E. Gonzalez, Associate Professor of Law, Rutgers School of Law--Newark; Visiting Associate Professor of Law, Santa Clara University School of Law; Kenneth W. Graham, Jr., Professor of Law, University of California at Los Angeles; Ariela Gross, Professor of Law & History, The Law School, University of Southern California; Louise Halper, Professor of Law, Washington & Lee University School of Law; Joel F. Handler, Richard C. Maxwell Professor of Law and Professor of Policy Studies, School of Public Policy and Social Research, University of California at Los Angeles; Sidney L. Harring, Professor of Law, CUNY Law School; Virginia Hench, Associate Professor of Criminal Law & Procedure & Civil Rights, University of Hawaii--Manoa; Kathy Hessler, Professor, Case Western Reserve University School of Law; Judith L. Holmes, Assistant Professor of Legal Studies, University of Massachusetts--Amherst; Wythe W. Holt, Jr., University Research Professor of Law, University of Alabama School of Law; Joan Howarth, Professor of Law, University of Nevada, Las Vegas; Marsha Huie, Professor of Law, The University of Tulsa College of Law; Eric S. Janus, Professor of Law, William Mitchell College of Law; Paula C. Johnson, Associate Professor of Law, Syracuse University College of Law; Jose R. Juarez, Jr., Professor of Law, St. Mary's University School of Law; David Kairys, James E. Beasley Professor of Law, Beasley School of Law, Temple University; Yale Kamisar, Clarence Darrow Distinguished University Professor of Law, University of Michigan; Jerry Kang, Professor of Law, University of California at Los Angeles; Lewis R. Katz, John C. Hutchins Professor of Law, Case Western Reserve University Law School; Eileen Kaufman, Professor of Law, Touro Law School; Michael J. Kelly, Assistant Professor, Creighton University School of Law; Raneta Lawson Mack, Professor of Law, Creighton University School of Law; David P. Leonard, Professor of Law and William M. Rains Fellow, Loyola Law School, Los Angeles; John Leubsdorf, Professor of Law, Rutgers Law School-Newark; Martin L. Levy, Professor, Thurgood Marshall School of Law, Texas Southern University; Jules Lobel, Professor of Law, University of Pittsburgh Law School; David Luban, Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center; Beth Lyon, Assistant Professor of Law, Villanova University School of Law; Holly Maguigan, Professor of Clinical Law, New York University School of Law; Samuel A. Marcosson, Associate Professor, Louis D. Brandeis School of Law, University of Louisville; Gary M. Maveal, Associate Professor of Law, University of Detroit Mercy School of Law; Robert F. Meagher, Emeritus

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Professor, Fletcher School of Law and Diplomacy, Tufts University; Carlin Meyer, Professor of Law, New York Law School; Jonathan M. Miller, Professor of Law, Southwestern University School of Law; Margaret E. Montoya, Professor of Law, University of New Mexico School of Law; Beverly Moran, Professor of Law, Professor of Sociology, Vanderbilt University School of Law; David A. Moran, Assistant Professor of Law, Wayne State University Law School; Mary-Beth Moylan, Instructor of Law, University of the Pacific, McGeorge School of Law; Millard A. Murphy, Esq., Clinical Instructor, Prison Law Clinic, University of California, Davis, School of Law; Kenneth B. Nunn, Professor of Law, Fredric G. Levin College of Law, University of Florida; James P. Ogilvy, Associate Professor of Law, Columbus School of Law, The Catholic University of America; Nancy K. Ota, Professor of Law, Albany Law School; Marc R. Poirier, Professor of Law, Seton Hall Law School; James Pope, Professor of Law and Sidney Reitman Scholar, Rutgers University School of Law; Deborah W. Post, Professor of Law, Touro Law School; William Quigley, Professor of Law and Director of the Loyola Law Clinic & the Gillis Long Poverty Law Center, Loyola Law School; Margaret Jane Radin, Wm. Benjamin Scott and Luna M. Scott Professor of Law, Stanford Law School; Martha Rayner, Associate Clinical Professor of Law, Fordham University School of Law; Judith Resnick, Arthur Liman Professor of Law, Yale Law School; Paula R. Rhodes, Associate Professor of Law, Director, LLM in American and Comparative Law Program, University of Denver College of Law; Henry J. Richardson, III, Peter J. Liacouras Professor of Law, Temple Law School; Annelise Riles, Professor of Law and Professor of Anthropology, Cornell University; Toni Robinson, Professor of Law, Quinnipiac School of Law; Florence Wagman Roisman, Professor of Law and Paul Beam Fellow, Indiana University School of Law-Indianapolis; Kermit Roosevelt, Assistant Professor, University of Pennsylvania Law School; Tanina Rostain, Associate Professor, New York Law School; Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale University; David Rudovsky, Senior Fellow, University of Pennsylvania Law School; Leila Nadya Sadat, Professor of Law, Washington University in St. Louis; Natsu Taylor Saito, Professor of Law, Georgia State University College of Law; Robert F. Seibel, Professor of Law, CUNY Law School; Franklin Siegel, City University of New York School of Law; Robert A. Sedler, Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties, Wayne State University; Marci Seville, Associate Professor of Law and Director, Women's Employment Rights Clinic, Golden Gate University School of Law; Marjorie Silver, Professor, Touro Law Center; Eileen Silverstein, Zephaniah Swift Professor of Law, University of Connecticut; David Sloss, Assistant Professor of Law, Saint Louis University School of Law; Ronald C. Slye, Associate Professor, Seattle University School of Law; Lloyd B. Snyder, Professor of Law, Cleveland State University; Andrej Thomas Starkis, Assistant Professor of Law, Massachusetts School of Law; Norman Stein, Douglas Arant Professor of Law, University of Alabama School of Law; Joan Steinman, Distinguished Professor of Law, Chicago-Kent College of Law; Robert N. Strassfeld, Professor of Law, Case Western Reserve University School of Law; Robert L. Tsai, Assistant Professor of Law, University of Oregon School of Law; Beth Van Schaack, Assistant Professor, Santa Clara University School of Law; Deborah M. Weissman, Associate Professor of Law and Director of Clinical Programs, University of North Carolina School of Law; Charles E. Wilson, Associate Professor of Law, The Ohio State University College of Law; Richard J. Wilson, Professor, Washington College of Law, American University; Adam Winkler, Acting Professor of Law, University of California at Los Angeles; Stephen Wizner, William O. Douglas Clinical Professor of Law and Supervising Attorney, Yale Law School; Mark E. Wojcik, Associate Professor of Law, The John Marshall Law School, Chicago; Frank H. Wu, Professor of Law, Howard University; Cliff Zimmerman, Clinical Associate Professor of Law, Northwestern University; National Lawyers' Guild, Heidi Boghosian, Executive Director; National Immigration Project Of The

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National Lawyers Guild, Dan Kesselbrenner, Executive Director; National Lawyers Guild New York Chapter, Dana Biberman, President; Human Rights Watch, James Ross, Senior Legal Counsel; Southern Poverty Law Center, Rhonda Brownstein, Legal Director; Unitarian Universalist Service Committee, Denise Moorehead, Deputy Director of Program; Puerto Rico Legal Defense and Education Fund, Incorporated, Foster Maer, Acting Legal Director; National Coalition to Protect Political Freedom, Kit Gage, President; First Amendment Foundation, Kit Gage, Director; National Lawyer's Guild/Maurice & Jane Sugar Law Center for Economic & Social Justice, Julie Hurwitz, Executive Director; Civil Liberties Monitoring Project, Jared Rossman, President; Association of Legal Aid Attorneys, U.A.W. Local 2325, Michael Letwin, Esq., President; Partnership for Civil Justice, Mara Verheyden-Hilliard, co-founder; Trial Lawyers for Public Justice, Rebecca Epstein, Staff Attorney; Freedom Socialist Party, Val Carlson; Jewish Alliance for Law and Social Action, Andrew M. Fischer; The Innocence Project at the Benjamin N. Cardozo School of Law, Nina Morrison, Esq., Executive Director; Ella Baker Center for Human Rights, Van Jones, National Executive Director; American Friends Service Committee, Mary Ellen McNish, General Secretary; Reber Boult, Esq., Albuquerque, New Mexico; Hunter Gray; John Mage, Esq., New York, New York; Douglas N. Masters, Esq., Chicago, Illinois; Laura Beth Nielsen, Research Fellow, American Bar Foundation; Leonard Weinglass, Esq., New York, New York; Camille Whitworth, Esq., Austin, Texas; Mitchell Zimmerman, Esq., Co-Coordinator, Law Professors for the Rule of Law; National Association of Criminal Defense Lawyers; American Civil Liberties Union Foundation; ACLU Foundation of Virginia, Amici Curiae in support of Appellees.

**No. 02-7338.**

Filed: July 9, 2003.

**ORDER**

Appellees filed a petition for rehearing and suggestion for rehearing en banc.

The panel voted to deny panel rehearing.

A member of the Court requested a poll on the petition for rehearing en banc, and a majority of the judges in active service voted to deny rehearing en banc. Judges Luttig, Motz, King, and Gregory voted to grant rehearing en banc. Chief Judge Wilkins, and Judges Widener, Wilkinson, Niemeyer, Williams, Michael, Traxler, and Shedd voted to deny rehearing en banc.

Judge Wilkinson filed an opinion, concurring in the denial of rehearing en banc. Judge Traxler filed an opinion, concurring in the denial of rehearing en banc. Judge Luttig filed an opinion, dissenting from the denial of rehearing en banc. Judge Motz filed an opinion, dissenting from the denial of rehearing en banc.

***341** The Court denies the petition for rehearing and suggestion for rehearing en banc. The mandate shall issue forthwith.

Entered at the direction of Judge Wilkinson for the Court.

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the denial of the rehearing en banc. The panel opinion written by Chief Judge Wilkins, Judge Traxler, and myself has already properly resolved this case. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003). I thus offer only these few comments in response to the dissent of my good colleague Judge Motz.

Hamdi is being held according to the time-honored laws and customs of war. There is nothing illegal about that. The option to detain those captured in a zone of armed combat for the duration of hostilities belongs indisputably to the Commander in Chief. Art. II, Sec. II. And the question is essentially whether the United States can capture and detain prisoners of war without subjecting the factual circumstances surrounding foreign battlefield seizures to extensive in-court review. [FN1] The answer to this is now--and always has been--yes. In giving prisoners of war the right to litigate their detentions in American courts, the dissent would install a more restrictive regime on the executive branch after September 11 than existed before. I regret that my colleague does not even quote the provisions of Article I and Article II which delegate the conduct of war to the coordinate branches of our

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government. For the course on which my dissenting colleague is embarked will trespass, increment by increment, upon those powers, to the detriment of the judiciary's own obligation to respect the proper limits and boundaries of its role.

FN1. The government does not concede that Hamdi is a prisoner of war, but rather asserts that he is an unlawful combatant. For the purposes of this case, the distinction is irrelevant because the decision to detain until the cessation of hostilities belongs to the executive in either case. *See Hamdi*, 316 F.3d at 469.

The panel earlier expressed doubt that the timing of a cessation of hostilities was even justiciable. *Hamdi v. Rumsfeld*, 316 F.3d at 476 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 169, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.")). It would be an intrusive venture into international relations for an inferior federal court to declare a cessation of hostilities and order a combatant's release when an American military presence remained in the theater of combat and when the status of combatants, their terms of release, and the mutuality of exchanges may all remain subjects for negotiation and diplomacy. *See Ludecke*, 335 U.S. at 169, 68 S.Ct. 1429; *The Three Friends*, 166 U.S. 1, 63, 17 S.Ct. 495, 41 L.Ed. 897 (1897); *The Prize Cases*, 67 U.S. 635, 670, 2 Black 635, 17 L.Ed. 459 (1862).

To claim, as my colleague does here, that there was no meaningful judicial review of Hamdi's detention is incorrect. There was extensive review of every legal challenge to Hamdi's detention. The dissent wishes to proceed further and litigate precisely why petitioner was seized and whether the military capture can be justified. The conduct of war, however, involves innumerable discretionary decisions made by our armed forces in the field every day. Many of them have life or death consequences. To subject these discretionary decisions made in the course of foreign combat operations to the prospect of domestic litigation would be an unprecedented step. Doing so would ignore the fundamentals of Article I and II--namely that they entrust to our armed forces the capacity to make the necessary and traditional ***342** judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war. *See The Prize Cases*, 67 U.S. 635, 670, 2 Black 635, 17 L.Ed. 459 (1862).

Hamdi's own filings make clear that he was seized in a zone of active combat operations. Hamdi's petition notes that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." *See* Petition for Habeas Corpus, p. 2. In their traverse, petitioners state that the petition does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." *See* Traverse and Response to Respondent's Motion to Dismiss, p. 2. And outside the legal arena, petitioner Esam Fouad Hamdi, in a letter to Senator Patrick J. Leahy, stated that they were "not challenging the battlefield determination, decision to detain individuals in the theater of combat." *See* Letter to Senator Patrick J. Leahy, August 5, 2002. Even the district court, while ordering a more intrusive examination of the circumstances of Hamdi's capture, noted that "[p]etitioners concede that Hamdi's initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge." *See* Order of August 16, 2002, p. 8. [FN2] Our review of the petition was undertaken in light of this undisputed fact.

FN2. The above submissions were repeatedly reinforced by Hamdi's counsel in open court. *See, e.g.*, "Hamdi[,] as far as I know, is the only [American citizen] out of all the detainees that were gathered up on the battlefield in Afghanistan." (Tr. of Oct. 28, 2000 oral argument at 37); Hamdi's counsel describing as "correct" the district judge's statement that "this man was in a fighting situation.... He was where the fight was." (Tr. of Aug. 13, 2002 district court proceedings at 70-71). Indeed, as Judge Traxler's thoughtful opinion indicates, the record is replete with admissions that Hamdi was captured in Afghanistan during hostilities, references that are fully consistent with the panel opinion and that make the locus of Hamdi's seizure susceptible to little more than metaphysical doubt. The fact that the panel may not have specifically quoted all such references in its opinion in no way implies that it rejected their validity.

The dissent makes the contention that Hamdi's father as next friend is incapable of making representations on Hamdi's behalf. *Post* at 371. But the cases my colleague cites in no way involved the constitutional principles implicated by a foreign battlefield capture. *See White v. Miller*, 158 U.S. 128, 15 S.Ct. 788, 39 L.Ed. 921 (1895); *Kingsbury v.*

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*Buckner*, 134 U.S. 650, 10 S.Ct. 638, 33 L.Ed. 1047 (1890); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir.1940). In seeking to deny effect to the filings of the next friend in this case, the dissent's approach would abrogate yet once again the separation of powers by endowing those deemed enemy combatants with rights comparable to those enjoyed by ordinary civil or criminal litigants. And in decrying this reasoning as "dizzyingly circular", *see post* at 371 n.1, the dissent again makes clear that nothing less than a full judicial exploration of the circumstances of petitioner's capture will suffice.

With respect, the dissent's demand for further factual inquiries raises many more questions than it answers. The dissent notes vaguely that it wants a non-hearsay basis for petitioner's detention and that the Mobbs Declaration must be probed for every incompleteness or inconsistency. *Post* at 368. While the dissent appears to acknowledge that the district court production order went too far, its specific criticisms of the Mobbs Declaration suggest otherwise. This desire to have courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.

The dissent declines to acknowledge the perils in its path, and we are left to guess at how it would proceed. Opposing affidavits would not likely satisfy the dissent, for they would leave the court to weigh one ***343** protestation against the other with little means of doing so. *Ex parte, in camera* review would set disputes in motion over the scope of redaction and create a whole new set of secrecy issues surrounding Hamdi's case. *Ex parte, in camera* submissions would likely please no one--neither the government required to hand over potentially sensitive materials, nor Hamdi who would be denied the chance to contest an *ex parte* review of them, nor the public who would be left in the dark about the real basis for resolving Hamdi's case. My dissenting colleague also laments the absence of "first-hand knowledge of Hamdi's conduct or status in Afghanistan." *See post* at 373. The dissent is plainly unwilling to trust the judgment of those actually fighting the war that Hamdi was properly seized. What further steps should the judiciary then be prepared to take? What kind of hearings? What role for counsel? What kind of showings? What sort of witnesses? The district court struggled with these questions to ill effect. *See Hamdi*, 316 F.3d at 470-71; *Hamdi v. Rumsfeld*, 243 F.Supp.2d 527 (E.D.Va.2002).

My colleague's desire for more and more information signals not the end of a constitutionally intrusive inquiry, but the beginning. To start down this road of litigating what Hamdi was actually doing among the enemy or to what extent he was aiding the enemy is to bump right up against the war powers of Articles I and II. Judges are ill equipped to serve as final and ultimate arbiters of the degree to which litigation should be permitted to burden foreign military operations. The ingredients essential to military success--its planning, tactics, and intelligence--are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil.

Because I think it both unreasonable and unfair to expect either judges or attorneys to discard a lifetime of honed instinct, I suspect that in time, if the course of the dissent is followed, the norms of the criminal justice process would come to govern the review of battlefield detentions in federal court. The prospect of such extended litigation would operate to inhibit our armed forces in taking the steps they need to win a war. The specter of hindsight in the courtroom would haunt decision-making in the field. At a minimum, if rules are to be prescribed for litigating something as sensitive as the soundness of battlefield detentions in Article III courts, then the prescription should come from Congress or the Executive--the branches of government charged by our Constitution with the conduct of foreign war. I cannot conceive of the courts on their own motion--without the considered input of the political branches--devising a set of procedures allowing prisoners of war to hold American commanders accountable in federal court. If any illustration of the difficulties and hazards of such a judicial enterprise were needed, the history of Hamdi's case should more than suffice.

My colleague also interprets a series of World War II-era Supreme Court cases as invitations for the judiciary to involve itself in an exacting review of decisions made on foreign battlefields. *Post* at 369-371. My colleague's overreading of these decisions misses their fundamental import: they are replete with warnings that the judiciary must stay its hand when reviewing an exercise of the Commander-in-Chief powers during wartime. *Ex parte Quirin*, for example, holds without reservation that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict ***344** with the Constitution or laws of Congress constitutionally enacted." 317 U.S. 1, 25, 63 S.Ct. 2, 87 L.Ed. 3 (1942). Likewise, *Johnson v. Eisentrager* emphasized that "[e]xecutive power over enemy aliens"--the enemy combatants at issue in that case--"undelayed and unhampered by litigation, has been deemed, throughout

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our history, essential to war-time security." 339 U.S. 763, 774, 70 S.Ct. 936, 94 L.Ed. 1255 (1950); *see also id.* at 778-79, 70 S.Ct. 936 (detailing the crippling complications that would arise from allowing searching judicial review of the petitioners' detention). And *In re Yamashita* noted that the military tribunals challenged in that case were "not subject to judicial review merely because they have made a wrong decision on disputed facts." 327 U.S. 1, 8, 66 S.Ct. 340, 90 L.Ed. 499 (1946). "Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined." *Ludecke v. Watkins*, 335 U.S. 160, 172, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948). These cases are caution signals to the judiciary, not green lights.

I seriously doubt that any mistake was made in Hamdi's case. But the Supreme Court in *Ex parte Quirin*, *Johnson v. Eisentrager*, and *In re Yamashita* was fully aware that war was a messy business, that mistakes could be made, but that close judicial review was nonetheless costly and constitutionally proscribed. And the panel in this case did not seek to move further than the precise case before it. *See Hamdi*, 316 F.3d at 465. To compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges. Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present. There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

Finally, although both the panel opinion and the dissent have noted the evidentiary shortcomings of the Mobbs Declaration, there is a value to having the United States state under oath its reasons for the detention of an American citizen, even one captured during the course of armed combat. [FN3] To go further, however, would be folly. It is precisely at the point of armed combat abroad that the government's detention interests in gathering vital intelligence, in preventing detainees from rejoining the enemy and in stemming the diversion of military resources abroad into litigation at home are at their zenith. It diminishes these interests to inquire whether the judiciary deems them "legitimate," "substantial," or "compelling," for they are grounded in the wording of Articles I and II themselves. The ***345** federal judiciary plays a vital role in securing our rights. But the other branches of government also play their part in securing the blessings of our liberty. In this case, the paramount right is that of the citizens of our country to have their democracy's most vital, life-or-death decisions made by those whom the Constitution charges with that task.

FN3. My colleague Judge Luttig's dissent attempts to straddle the issue by taking sides with both parties. On the one hand, it asserts that "the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting his designation by the Executive as an enemy combatant." *Post* at 358. On the other hand, it argues that it is likely that "the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard." *Post* at 367. In all events, the panel had before it the straightforward situation where petitioners' filings repeatedly corroborated the government's assertions that the locus of Hamdi's capture was a zone of active combat operations abroad. Unsurprisingly, the panel addressed the case on the basis of what was before it.

In sum, this petition was properly dismissed.

TRAXLER, Circuit Judge, concurring in the denial of rehearing en banc:

In their dissents from the denial of rehearing, my colleagues have appreciated the nature and magnitude of the competing interests at stake here. However, because I believe that their opinions at times have unfairly and inaccurately characterized the panel opinion, I regrettably find myself drawn to offer a few comments in response. [FN1]

FN1. Because Judge Wilkinson has already written eloquently, and primarily, in response to Judge Motz's dissent, I focus my comments chiefly on matters raised by Judge Luttig.

I.

Each of my dissenting colleagues argues that the panel erred in premising its decision on the "admission" that Yaser Esam Hamdi was captured within the boundaries of Afghanistan. Judge Luttig questions whether any such admission was made, at least in the petition, and Judge Luttig and Judge Motz both believe that any such admission should be ineffective because it was made by Hamdi's father, Esam Fouad Hamdi, acting as Yaser Esam Hamdi's "next friend," and not directly by Yaser

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Esam Hamdi.

A.

I begin with Judge Luttig's charge that the panel opinion "is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as 'undisputed' " because they were not, in his view, "conceded in fact." As an initial premise, I would point out that the panel decision does not characterize *all* the circumstances of Hamdi's seizure as being undisputed. Rather, it characterizes *one* circumstance of Hamdi's seizure as undisputed--his presence in Afghanistan while active military operations were being waged by the United States military against the governing Taliban regime. Hamdi's reason for being in Afghanistan at the time he was seized and the question as to whether he was indeed actively engaged as an enemy to our forces and this country are very much in dispute. The government asserts that Hamdi was in Afghanistan bearing arms as a Taliban soldier when he was seized; Hamdi's father asserts that Hamdi was only temporarily residing in Afghanistan while engaged in relief work when he was apprehended. Thus, the panel opinion's observation is in reality limited to the simple fact that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Hamdi*, 316 F.3d at 459. [FN2]

FN2. *See also Hamdi*, 316 F.3d at 460 (noting that the petitioner "acknowledg[ed] that Hamdi *was seized in Afghanistan* during a time of active military hostilities") (emphasis added); *id.* at 461 (noting that it was "undisputed that Hamdi *was captured in Afghanistan* during a time of armed hostilities there") (emphasis added); *id.* at 474 (noting that "Hamdi's petition *places him* squarely within the zone of active combat") (emphasis added); *id.* at 476 (noting that "it is undisputed that [Hamdi] was captured in a zone of active combat operations").

As to this more narrow point of disagreement, Judge Luttig correctly observes ***346** that the habeas petition does not *explicitly* state that "Hamdi was captured in a zone of active combat in a foreign theater of conflict." *Id.* However, from this single pleading omission, Judge Luttig inexplicably leaps to the conclusion that the remaining petition allegations are ambiguous on the question (or, worse, that we should ignore them) and, even more inexplicably, to the belief that when responding to a dissent to a denial for rehearing en banc, the panel has somehow forfeited a right to point to any other pleading or representation filed or otherwise made *by the petitioner* that supports the observation, unremarkable when made, that Hamdi was indeed in Afghanistan when captured.

First, the petition's failure to affirmatively state that Hamdi was captured in a foreign combat zone did not and still does not compel me to ignore the other allegations that are present, nor does it cause me to consider that the place of Hamdi's capture is a matter of dispute. As Judge Wilkinson has pointed out, the petition alleges that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." J.A. 9. [FN3] Were this the only allegation made, I suppose I could speculate about whether Hamdi had traveled from his "reside[nce] in Afghanistan" to another country "when [and where he was] seized by the United States Government," but I need not do so. *Id.* Significantly, the one statement quoted above is not the only allegation made; the petition provides a great deal more information than that. It avers that, following the terrorist attacks on September 11, 2001, "the United States initiated military action against the Taliban Government in Afghanistan," and that, "in the course of the military campaign, ..., the United States provided military assistance to the Northern Alliance." J.A. 10. As a result of this military assistance in Afghanistan, the petition states that

> the United States obtained access to individuals held by various factions of the Northern Alliance. On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. It goes on to allege that "[o]n or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantanamo Bay, Cuba," and that on or about that same date, "the United States military transferred Yaser Esam Hamdi to Camp X-Ray, Guantanamo Bay." J.A. 11.

When we authored the panel opinion, I did not consider these petition allegations to be ambiguous, nor do I today. A plain reading of the submission to us made clear that Esam Fouad Hamdi, as next friend to Yaser Esam Hamdi and as his father, based his claims in large part on the fact that Yaser was seized in Afghanistan in the course of the United States military operations within that country. His contention was that the United States military should release Yaser because he was not in Afghanistan to fight us or our allies and, therefore, was not *properly* being held as an "enemy

FN3. According to later representations made by his father, Hamdi left "Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries," and became "trapped in Afghanistan once the military campaign began." J.A. 153.

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combatant" by our military forces.

There was not then and there is not now any reason to be troubled by the lack of an *explicit* allegation in the petition that Hamdi was seized in a zone of active combat in a foreign theater of conflict, because any possible question about whether the petition was incomplete or uncertain in its intent to allege that Hamdi was actually ***347** one of the prisoners captured and detained in Afghanistan would have been eliminated by Hamdi's Traverse and Response to the government's motion to dismiss, in which the petitioner engages in his own characterization of the substance of the factual allegations and the claims contained within the petition.

There, the petitioner unequivocally represents that the "claim [does not] implicate Respondents' initial detention of Petitioner Hamdi *in Afghanistan*," but "challenges only his current indefinite imprisonment in the United States Naval Brig in Norfolk, Virginia" and that, because petitioner did not contest the initial detention of Hamdi in Afghanistan, "Hamdi's claims have no practical consequences for the conduct of the military overseas." J.A. 64-65. [FN4] I do not see how the petitioner could be any clearer. He acknowledged that "[a]ccording to *both* the Petition *and* the Mobbs Declaration, Petitioner Hamdi was captured by the Northern Alliance and transferred into the custody of the United States in the Fall of 2001 or late 2001," J.A. 67 (emphasis added), represented that "[i]n January 2002, Respondents transported Petitioner Hamdi from Afghanistan to Guantanamo Bay, Cuba," J.A. 69, and complained that Hamdi was being punished by his "isolat[ion] from others similarly situated in Afghanistan and Guantanamo Bay, Cuba." J.A. 71. [FN5]

FN4. We have also been challenged for our alleged "altered and paraphrased rendition" of the petition's allegation concerning the location of Hamdi's seizure. We did interpret the petition as alleging that " 'Hamdi was captured or transferred into the custody of the United States in the Fall of 2001' *in Afghanistan*." *Hamdi*, 316 F.3d at 460 (emphasis added); *see* J.A. 10. But, even if we assume that the petition was ambiguous on this point, we did not "suppl[y] a geographical location of [Hamdi's] seizure and detention" nor "imput[e] a representation as to this location to the next friend," as charged by Judge Luttig; the next friend supplied the geographical location. Any ambiguity as to whether Hamdi was captured or transferred to the United States military in Afghanistan was likewise cleared up by the next friend's own characterization of his claim.

FN5. Consistent arguments were also made to this court. For example, Hamdi argued that no deference was due the Respondents because, *inter alia*, "Hamdi's claims do not challenge the conduct of foreign policy, military decision-making, or even the propriety of his initial detention in Afghanistan," but instead challenge "the legality of his indefinite detention in a Norfolk naval brig without due process." Appellees' Brief at 27. Later, it was again represented that "Hamdi's claims do not require review of Respondents' prosecution of the war effort. As noted earlier, Hamdi's claims do not seek judicial review of the Executive Branch's conduct overseas." Appellees' Brief at 40. At yet another point, Hamdi argued that the "Respondents [had] mischaracteriz[ed] Hamdi's claims as an effort to 'second-guess[ ] the military determination' of his enemy combatant status," representing that "[o]n the contrary, the underlying claims in this case are designed to test the legality of Hamdi's imprisonment in a naval brig in Norfolk, Virginia, not a military determination made overseas...." Appellees' Brief at 44. And, during oral argument, Hamdi again clarified that he was *not* challenging the legality of his initial seizure and detention *in Afghanistan* as an enemy combatant, but rather was only asserting that as one moves away from a foreign battlefield to the United States where civil courts are open and functioning, the deference due to the military's battlefield decision decreases.

Additionally, as Judge Motz has observed in her dissent, we had been presented in the Joint Appendix with a letter written by Hamdi's father to United States Senator Patrick Leahy (which *petitioner* had submitted to the district court). In the letter, Hamdi's father stated that Yaser had "left our home in Saudi Arabia for Pakistan and then Afghanistan on July 15, 2001 to do relief work in those countries," "was trapped in Afghanistan once the military campaign began," and "was caught up ***348** in a local dragnet of non-Afghans in Mazar- e-Sharif in Afghanistan in November 2001" along with John Walker Lindh. J.A. 153. He was then "kept in [an] Afghanistan jail for 2-3 months prior to being moved to Guantanamo Bay where he stayed for 2 months before they confirmed that he [was] an American citizen, then they moved him to the Norfolk jail." J.A. 154. At no time was it ever hypothesized that Hamdi might not have been in Afghanistan when

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he was seized. Indeed, it was affirmatively represented that Hamdi was "caught at the same time Mr. John Walker Lindh was caught" in Afghanistan, but that he was "not [being] treated the same way," and was not properly determined to be "an enemy combatant." J.A. 154. [FN6]

FN6. *See* *United States v. Lindh*, 227 F.Supp.2d 565 (E.D.Va.2002); *United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va.2002); *United States v. Lindh*, 198 F.Supp.2d 739 (E.D.Va.2002).

In keeping with affirmative representations made to the court, at no time did anyone on either side of this controversy aver or allege that Hamdi was anywhere other than Afghanistan when he was captured or detained by the Northern Alliance or when he was turned over to the United States military. Judge Luttig has not pointed to a single contrary allegation. Nor did Hamdi's most capable counsel "gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat," as Judge Luttig might have us believe. The case has at all times been litigated by counsel based on the consistent position of Hamdi's father that his son was in Afghanistan and was captured there by our military, but that he was not there as an enemy combatant. Even in his petition for rehearing and rehearing en banc, Esam Hamdi did not assert that Yaser was somewhere other than in Afghanistan when seized; on the contrary, the petition *affirmatively acknowledges* that Hamdi's presence in Afghanistan is indeed an "undisputed" fact. The petition seeks a remand in order to allow Yaser Hamdi the opportunity to meet with counsel and contradict the government's assertion that he *was in a zone of combat operations* within the country of Afghanistan. Again, the petition seeks to litigate the factual question of *why* Hamdi was in Afghanistan when he was seized and, more precisely, whether he was actively engaged as an enemy to our forces, not *whether* he was in Afghanistan during wartime.

I cannot base a decision in so momentous a case on the theoretical possibility that the general allegations in the petition--that the United States obtained access to Hamdi and other prisoners in the custody of the Northern Alliance in Afghanistan and transferred these prisoners "captured in Afghanistan" to Guantanamo Bay--are wrong and do not apply to Hamdi's situation. Indeed, it would be ludicrous for us to somehow presume that they were not intended to be believed. Nor do I know of any precedent that would prompt us here to ignore the factual representations made by the petitioner and counsel in support of the petition. Because the government moved to dismiss the petition, I have assumed the factual allegations of the petition to be true and, for that matter, have accepted the petitioner's in-court representations regarding how they were intended to be interpreted. I am unfamiliar with any principle that would require us to assume that the factual allegations and in- court representations made by the petitioner *and* the government are false, and none has been cited to me. Indeed, it would seem inappropriate for us to impute such strange intentions to Hamdi's father and his counsel. *Cf.* ***349***S. Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 428 n. 8 (3d Cir.1999) (employing a "reasonable reading of the complaint" to supply an allegation not expressly made by the plaintiffs).

Petitioner's position has remained quite constant throughout this appeal-- that, because Hamdi is an American citizen by birth, he was entitled to meet with appointed counsel in order to contest the factual basis underlying the military's designation of him as an enemy combatant, as opposed to a peaceful resident, in Afghanistan--*once he was removed from the battlefield.* We found this position untenable, holding (for a great many reasons which I need not reiterate here) that when an American citizen is captured in an enemy country where we are engaged in active hostilities, we will require no more legal justification than what the government voluntarily provided to us in this case. I am still of the belief that this is the proper and legal course of analysis. And I reject, with little hesitation, this bemusing attempt to rewrite the case history and the substance of the habeas claim placed before us.

B.

I likewise disagree with Judge Luttig's belief, shared by Judge Motz, that Hamdi's capture in Afghanistan is not "susceptible to concession in law because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." I am also cited to no authority for the proposition that we should ignore or disbelieve the petitioner's allegations that Hamdi was taken into military custody in Afghanistan during the combat operations being waged there at the time (whether made expressly in the petition, by implication from its allegations, or by virtue of the petitioner's representations as to the intended meaning of the allegations) merely because the allegations were not personally written by Yaser Hamdi.

Indeed, a next friend does have the power to admit facts on behalf of the real party in interest, subject to the supervision of the court. *See* Hall v. Hague, 34 F.R.D. 449, 450 (D.Md.1964). Were it otherwise, a next friend might be compelled to contest every fact which might be relevant, thereby creating unnecessary trouble and expense for the parties and the court. *See id.* at 449-50. Or, the mere filing of a next friend petition challenging civil disabilities might compel the lifting of such disabilities so that the real party in interest might participate fully in the litigation. The latter possibility is particularly ominous in a case such as this, as it would enable an alleged enemy combatant to disrupt, with no showing whatsoever, safeguards that the Executive has determined are necessary to protect vital national security interests. [FN7] In sum, I do not believe the panel erred in construing the petition to admit that Hamdi was captured in Afghanistan and in giving effect to that admission.

FN7. The cases cited by Judge Motz do not compel a contrary conclusion. *See* White v. Miller, 158 U.S. 128, 146, 15 S.Ct. 788, 39 L.Ed. 921 (1895); Kingsbury v. Buckner, 134 U.S. 650, 680, 10 S.Ct. 638, 33 L.Ed. 1047 (1890); Stolte v. Larkin, 110 F.2d 226, 233 (8th Cir.1940). The cases do not translate to a holding that the court, as opposed to the next friend, is charged with the duty to rewrite a claim brought by a next friend on behalf of a military detainee so as to assure its survival. Here, there is no reason to believe that rights are being bargained away or that a factual mistake is being made. There is surely no doubt as to the nature of the claim before us.

C.

This brings me, regrettably, to Judge Luttig's accusation that Judge Wilkinson *350 and I have "attempt[ed] to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone." In a series of charges, Judge Luttig complains that Judge Wilkinson's concurrence "makes reference not only to the next friend petition upon which the panel solely relied, ... but also to the new materials cited by the government in its response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded, [including] Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court ....", charges that this is but another example of "the trend in our court to attempt 'to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion,' " and presumes that our reliance upon petitioner's representations made about his petition is but an improper attempt to "shore up" our joint panel opinion because the panel now "senses ... analytical softness of its opinion."

First, I can state without hesitation that I have no "sense" that our decision is analytically soft at all. On the contrary, the dissent's failure to point to a single allegation or statement in the record of this case that creates a dispute as to where Hamdi was when he was seized or detained by our allies or our own military forces should end the discussion.

Second, Judge Luttig appears to have forgotten his characterization of our panel opinion as a "challenged panel opinion," albeit *challenged* in the form of the dissents written by Judge Luttig and Judge Motz to the full court's vote *not* to rehear the case en banc. Judge Luttig's criticism appears to be premised upon a belief that when panel members write in response to a dissent to a denial of rehearing en banc, it is improper for them to refer to anything in the original record which was not specifically referenced in the panel decision, as this would amount to "supply[ing] ... important new facts or reasoning" not susceptible to appellate review. Such "additional support," Judge Luttig asserts, became "irrelevan[t] as a matter of law given that they were not relied upon in the panel opinion."

Obviously, any response by a panel, unanimous at the time the decision was rendered, to a dissent from a denial of rehearing en banc might be construed as an act of bolstering or "shor[ing] up" the published opinion in some sense. Otherwise, there would be nothing to say. Yet, I find no reason to remain silent when our opinion is being misinterpreted. I am confident that neither Judge Wilkinson nor I have informally "modif[ied]" the panel decision which we, along with Judge Wilkins, so painstakingly authored together. It is not my opinion-writing practice to recite every source of information contained within a joint appendix, nor every source directly relied upon in arguments. Indeed, there is rarely, if ever, a need to clutter an opinion with record support for uncontroversial statements that the parties have not contested in their pleadings, responses, briefs, or arguments.

In any event, I see no need to modify the panel opinion because we have pointed to no "important new facts or reasoning." We observed in the panel opinion that the habeas petition before us for disposition placed Hamdi in an enemy country when he was seized and detained by our military forces as an enemy combatant. In response to Judge Luttig's charge that the language of the petition does *not* place Hamdi in Afghanistan at the point of seizure, Judge Wilkinson and I have only gone so far as to point out that any question*351 as to whether we have properly characterized the claims can be laid to rest by petitioner's own characterization of those allegations. Neither of us has pointed to anything that has not at all times been a part of the record and entirely consistent with the petition's allegations outlined above. [FN8]

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FN8. For this reason, I also think it misleading to characterize the Traverse and Leahy letter as "new materials cited by the government in response to the petition for rehearing in support of the court's conclusion that the location of seizure has been conceded." These materials have been in the district court record and in the Joint Appendix since the inception of the appeal, and have been referred to by the parties throughout this litigation. There is nothing "new" about them. With specific regard to Esam Hamdi's letter to Senator Leahy, we are additionally confronted by Judge Motz's view that it was improperly "ignored" by us and Judge Luttig's belief that it should have been ignored because it is "obviously irrelevant" to the issue. We considered everything submitted by the parties in the Joint Appendix and all of the arguments when authoring our joint opinion. We did not ignore the Leahy letter or find it to be "obviously irrelevant." The letter was presented to the district court by Hamdi's counsel, along with several other documents. The panel did not expressly cite to the letter to support the observation that Yaser Esam Hamdi was captured in a combat zone. But, like the Traverse (and other representations made below and at oral argument before this court), the Leahy letter was perfectly consistent with the unremarkable observation which we drew from the allegations of the petition before us and as they had been represented to us, *i.e.*, that Hamdi was indeed in Afghanistan when he was seized. It certainly did not raise any ambiguity in the petition concerning Hamdi's location when he was seized.

II.

I turn next to Judge Luttig and Judge Motz's shared belief that we have placed undue significance on the fact that Hamdi was seized in a foreign combat zone in evaluating the legal sufficiency of the Mobbs Declaration and, by doing so, have somehow paved the way for widespread deprivation of the individual constitutional rights of our citizens.

First, we have not pulled the significance of this simple fact from thin air. It is grounded in the time-honored rule of law in wartime--that all persons residing in an enemy country during hostilities are deemed to be enemies, regardless of nationality. *See Juragua Iron Co. v. United States*, 212 U.S. 297, 305-06, 29 S.Ct. 385, 53 L.Ed. 520 (1909). "[U]nder the recognized rules governing the conduct of a war between two nations, ... all persons, whatever their nationality, who reside [ ] [in the enemy country] [are], pending such war, to be deemed enemies of the United States and all of its people." *Id.*; *see also Lamar v. Browne*, 92 U.S. 187, 194, 23 L.Ed. 650 (1875); *Young v. United States*, 97 U.S. 39, 60, 24 L.Ed. 992 (1877). This is not to say that all persons residing within the enemy country are *in fact* enemies, or specifically that Hamdi was necessarily an enemy combatant merely because he was in Afghanistan during a conflict between the United States and the Afghan government. But, significant consequences necessarily attached to Hamdi's presence in Afghanistan; his individual rights stood in tension with the Executive's wartime powers under Article II. Consequently, the Judiciary became compelled, by the nature of war and by dint of the separation of powers we are required to safeguard and honor, to give deference to the Executive to determine who within a hostile country is friend and who is foe. [FN9]

FN9. In his petition for rehearing and rehearing en banc, petitioner argued it could only be said to be undisputed that Hamdi was in a zone of active combat operations if the entire country of Afghanistan is such a zone at the time of capture. I have no problem with this view. The United States is in a sanctioned military operation designed to oust from power the governing regime of the country of Afghanistan. Just as we "are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not," *Hamdi*, 316 F.3d at 474, we are ill-positioned to question the military's determination that any particular area of a country with whom we are at war is or is not an "active combat zone."

*352 Second, Judge Motz and Judge Luttig's collective fear that our recognition of this time-honored principle might result in innocent journalists or unwitting tourists falling victim to unreviewable military detentions anywhere in the world can be easily laid to rest. Judge Motz, for example, asserts that our decision would allow "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, [to] be imprisoned indefinitely" by our military, that "any American citizen seized in a part of the world where American troops are present--*e.g.*, the former Yugoslavia, the Philippines, or Korea--could be imprisoned indefinitely, merely by asserting that the area is a zone of active combat," and the even more

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extreme "fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, *even one captured on American soil*, who the Executive designates an 'enemy combatant,' as long as the Executive asserts that the area in which the citizen was detained was an 'active combat zone,' and the detainee, deprived of access to courts and counsel, cannot dispute this fact." Judge Luttig also points to "[t]he embedded journalist or even the unwitting tourist" who "could be seized and detained in a foreign combat zone." And, he too claims that such a likelihood would be "far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state."

Although effective in stirring emotion, our colleagues' expressed fears are grounded in conclusions not reached or even predicted by the panel decision. Our decision does not speak to the issue of whether an "enemy combatant" may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations for purposes of the President's exercise of his Article II war powers. Rather, it addresses only the appropriate level of deference to be observed when the President exercised his power to detain an American citizen found within the boundaries of Afghanistan during our military efforts to overthrow its governing regime. Nor does it sanction indefinite detention, but rather contemplates detention for the duration of such hostilities.

In short, my colleagues' collective desire (albeit undertaken for much different reasons) to redefine the case before us has caused them to lose their focus on our holding. Afghanistan is an identifiable nation state and Hamdi was in a conventional war situation. Every resident within Afghanistan (including Hamdi as was explicitly alleged) was in law an enemy, until determined by the Executive to be a friend. As Judge Wilkinson aptly observed, war is a messy business and mistakes can be made. American journalists and American tourists who venture into a country with whom we are at war without the approval of our military, or who fail to return to this country in time of war, necessarily expose themselves to many risks, including this one. But the circumstances of armed conflict against a foreign government in a foreign land require the deference we have shown the Executive in the making of military decisions.

*353 III.

Despite their common criticism of our observation that Hamdi was captured in Afghanistan--and our belief that Hamdi's capture in Afghanistan guides our inquiry as to whether the Mobbs Declaration is sufficient to justify Hamdi's detention as an enemy combatant--our colleagues differ significantly in their opinions as to what kind of review is appropriate.

Judge Motz would hold that the Mobbs Declaration is *insufficient* to justify Hamdi's enemy combatant designation. And, although she disagrees that Hamdi's capture in Afghanistan is undisputed, in the end it really matters not to Judge Motz whether Hamdi was seized in Afghanistan. As Judge Wilkinson has noted, Judge Motz believes it proper for the Judiciary to litigate precisely why Yaser Hamdi was seized and whether the military capture can be justified regardless of where the seizure occurred. In short, Judge Motz "would require a greater showing from the Executive before [she] would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to appear in court, contest the allegations against him, or consult with a lawyer." For the reasons expressed by Judge Wilkinson, I, of course, disagree.

Judge Luttig also contests our observation that Hamdi was present in Afghanistan when he was captured, but only pays lip service to Judge Motz's belief that we would have to give Hamdi access to counsel and a direct voice in an Article III court in order to determine his place of seizure. Unlike Judge Motz, it appears that Judge Luttig would in practice not give Hamdi a voice to either concede or dispute the place of seizure. Rather, Judge Luttig "believe [s]" he would adopt at most a "some evidence" standard as the appropriate level of deference due and "would likely conclude, as argued by the United States, that the facts recited in [the Mobbs' Declaration] are sufficient" to satisfy it. In other words, it seems Judge Luttig would hold that the Mobbs Declaration is *sufficient* to justify Hamdi's enemy combatant designation *regardless* of whether Hamdi admitted his presence in Afghanistan or flatly disputed it.

From this, I can only assume that Judge Luttig is really dissatisfied not because we have refused to give Hamdi a voice to raise a dispute as to his place of seizure, but because we evaluated the legal sufficiency of the government's response within the context of Hamdi's capture in Afghanistan. Thus, Judge Luttig charges, by "refus[ing] to rest decision on the proffer made by the President of the United States" and instead "rest[ing] decision on a putative concession by the detainee," we have "all but eviscerate[d] the President's Article II power to determine who are and who are not enemies of the United States during times of war." He accuses us of "disown[ing] [our] promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States," and

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predicts that our rule "will henceforth ... cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee." "[I]n every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," Judge Luttig laments, "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Such hyperbole is not only unwarranted, it is plainly wrong.

Judge Luttig's first misrepresentation lies in his characterization of our opinion as holding that "more is 'unnecessary to a *354 meaningful judicial review' of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone." We have held no such thing, nor can such be fairly read from our opinion. The inaccuracy of this "paraphrased rendition" of our holding is readily apparent. The language quoted by Judge Luttig from the panel opinion is excised from the following passage from our opinion which follows an extensive discussion of the contents of the Mobbs Declaration and the practical problems of active judicial supervision of combat operations overseas:

> [B]ecause Hamdi was indisputably seized in an active combat zone abroad, we will not require the government to fill what the district court regarded as gaps in the Mobbs affidavit. The factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and ... is consistent with the Constitution and laws of Congress. *Asking the executive to provide more detailed factual assertions* would be to wade further into the conduct of war than we consider appropriate and *is unnecessary to a meaningful judicial review* of this question.

*Id.* 316 F.3d at 473 (emphasis added) (citations omitted). Obviously, we did not hold that Hamdi's concession of seizure in a foreign combat zone rendered further judicial inquiry into an enemy combatant designation unnecessary. For the constitutional and practical reasons extensively discussed in the opinion, we held that Hamdi's presence in a war zone when seized rendered judicial inquiry *beyond* the legal sufficiency of the government's response unnecessary to a meaningful judicial review.

Indeed, we expressed *no* opinion as to whether the Mobbs Declaration was more than sufficient or just enough to ensure meaningful judicial review of the Executive's detention of an American citizen in an enemy country as an enemy combatant. The submission of the Mobbs Declaration was not directed by the Judiciary. Rather, the government voluntarily opted to provide, under oath, a level of information it believed to be legally sufficient to justify detention of an American citizen captured during the course of armed conflict in a foreign theater of battle, and asked us to respect the balance of powers and accept it as sufficient to warrant dismissal of the petition before us. And, we did indeed accept the Executive's voluntary proffer as sufficient. We took care not to make grand pronouncements as to what we might do in a different case, and even went so far as to expressly discourage any propensity on the part of others to view our decision as moving beyond the set of circumstances before us. Judge Luttig decries what he believes to be a "Pyrrhic victory" for the government, but it has lost nothing. Even if we assume that the government sought such a broad holding, the most that can be said is that they did not get all they wanted and must seek it elsewhere.

Judge Luttig's second misrepresentation comes in the form of the prediction that, as a result of our opinion, "in every instance in which the [habeas] petitioner refrains from affirmative concession that he was seized in a foreign combat zone," "counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant." Our opinion says no such thing. We held that the Mobbs Declaration was sufficient to allow meaningful judicial review of Hamdi's detention because he was within a hostile country when captured. We did not predict what would constitute meaningful judicial *355 review of the detention of an United States citizen in cases in which the place of seizure is unknown or alleged to be within a country with whom we are not actively at war. Although we left open the possibility that the place of seizure might require further factual inquiry depending upon what representations the government provided, we did not hold that extended judicial review of the Executive's determination *that one is an enemy combatant* would become appropriate merely because a dispute existed *as to the place of capture*. Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case. Our opinion dealt, as it should, with the precise situation before us.

IV.

Finally, while I fully recognize that we have not gone as far as Judge Luttig would have us go, I take umbrage at his charge that this panel, as a result of "decisional paralysis," has "retreated" from its constitutional duty to decide this case based upon the facts presented and, instead, has fabricated a fact to ease our task. Nothing could be further from the truth. The government makes no such charge, no doubt cognizant that, in accordance with time-honored principles of constitutional decision-making, we have gone no further than necessary to resolve the delicate balance of

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constitutional interests before us. *See Poe v. Ullman*, 367 U.S. 497, 503, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of strictest necessity.") (quoting *Parker v. County of Los Angeles*, 338 U.S. 327, 333, 70 S.Ct. 161, 94 L.Ed. 144 (1949)); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' ") (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)); *id.* ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' "). *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 49 L.Ed. 482 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). Nor, for that matter, does the petitioner, who argues not that Yaser's presence in Afghanistan was a matter of dispute, but only that we should not as a legal matter rely upon the allegations of the petition and the representations of the petitioner for the premise that Yaser was in an active combat zone within that country.

Nor is it fair to say that we "retreated to ground that ... neither party attempted to defend." The government has recognized the significance of the place of capture from the outset of this case, arguing to us that "[t]he military determination at issue in this case--the decision to detain someone who was armed with an assault rifle when he surrendered *in a combat zone* as part of an enemy unit--directly implicates the national defense, not to mention the safety of American soldiers still stationed *in the zone of conflict*, and falls at the heart of the military's ability to conduct war." Respondents' Brief at 27. So has the petitioner, who has repeatedly disclaimed any intent to challenge a battlefield seizure in Afghanistan, but only Hamdi's current detention in the United States.

This case was presented to us on appeal from the district court's order finding that the Mobbs Declaration was insufficient to *356 allow meaningful judicial review of Hamdi's classification as an enemy combatant. We held that the Mobbs Declaration provided by the government in response to the habeas petition was sufficient to uphold Hamdi's detention as an enemy combatant under the President's wartime powers. We have upheld the President's Article II power as Commander in Chief of the armed forces to defend this country from its enemies and to determine who are and who are not enemies of the United States within countries where we are engaged in active hostilities.

Yaser Hamdi's status as an American citizen entitles him to petition the Judiciary personally, or by next friend if he cannot for reasons of national security, for habeas relief and thereby to demand a response from the Executive as to why the detention is an acceptable utilization of his Article II powers. In the exercise of our Article III powers, we review that response and may consider any legal arguments as to why the detention does not comport with a lawful exercise of war powers. Because Hamdi was within a country with whom we were fighting when he was seized, principles of separation of powers and practicalities of armed conflict dictate that we defer to the Executive's determination as to who is foe and who is not. Hamdi may test the legal basis for his detention. But, beyond that, Hamdi may be held, not indefinitely, but for the duration of active hostilities just like other non-citizen detainees captured in an enemy country by our military forces making a battlefield determination that the person detained was there to take up arms against our soldiers. And, in the holding most overlooked but most directly applicable to the claim as it was filed and argued before us, Hamdi's transfer by the military from the enemy country to Guantanamo Bay and then to the United States did not result in a greater right to challenge his designation.

In the end, Judge Luttig complains not because we accepted the Mobbs Declaration as sufficient and, thereby, granted the President the deference he sought from us. Rather, he complains because we have not forecast a similar level of deference in other contexts by adopting a global standard of review for all Executive detentions undertaken in the "war against terror." But, in order to reach this broader holding, he must attempt to find fault with our observation that Hamdi was in Afghanistan when seized, and he must characterize, however inaccurately, our opinion as resting *solely* upon that observation.

The impropriety of reaching beyond this case to decide another is, in my view, quite obvious. Judge Luttig opines that he would probably adopt the "some evidence" standard advanced by the government and hold that the Mobbs Declaration would be sufficient even in the face of a factual dispute as to whether Hamdi was in Afghanistan. That question, however, does not merely raise a single difficult issue, as posited by Judge Luttig, as to what the global standard should be for this and other cases. Rather, it raises many difficult issues related to the President's Article II wartime powers and how they will ultimately be interpreted in an age of terror. And, no matter how interesting such questions may be, they are simply not before us. We are not dealing with the President's designation of Hamdi as an enemy combatant because he is a terrorist in the "war against terror" declared after the tragic events of September 11, 2001. Had Hamdi's

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petition been grounded in an allegation that he was seized in France under the auspices of the "war against terror," and had the military agreed to that allegation and designated him an enemy combatant, then we would have a much *357 different case. Had Hamdi's petition been grounded in an allegation that he was seized in the United States under the auspices of the "war against terror," and the government agreed, then we would have a case not unlike Padilla v. Rumsfeld. [FN10] In both hypothetical situations, we might well be called upon to weigh other important national security interests. Whereas we would not likely face the dilemma of pulling military commanders out of the theater of war to testify in a court of law, for example, we would likely encounter such issues as whether France or the United States is a "zone of active military operations" and, if not, whether such seizures in a noncombat country can be a valid exercise of the Executive's Article II war power.

FN10. *See* Padilla v. Rumsfeld, 243 F.Supp.2d 42 (S.D.N.Y.2003); Padilla v. Bush, 233 F.Supp.2d 564 (S.D.N.Y.2002).

I need express no opinion on such issues because they are not before us. As the government's response to the petition makes clear, we are dealing with the President's designation of Hamdi as an enemy combatant in the war against Afghanistan with the stated goal of ousting the Taliban regime in order to end its support for Al Qaida and other terrorist networks. The conflict in Afghanistan is certainly related to the global conflict referred to as the "war against terror," but it is unquestionably a military conflict that falls quite neatly within our historical concepts of war. The questions Judge Luttig wishes to address might include some of the more novel, complex, and interesting ones a court could be called upon to contemplate, but no matter how much we might like to deal with them, they are not before us. We should not reach beyond this case to decide them.

LUTTIG, Circuit Judge, dissenting from denial of rehearing *en banc*:

As should be true under a rule of law, the reasoning underlying our resolution of the important issue presented by this appeal has implications beyond the particular dispute before us. In this instance, those implications are for no less commanding constitutional interests than the President's power to conduct war and the right of our citizens to be free from governmental restraint except upon lawful justification.

As my colleagues have recognized, the panel's opinion resolving the important issue presented by this suit is unpersuasive, because of its exclusive reliance upon a mistaken characterization of the circumstances of Hamdi's seizure as "undisputed," when those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances. That the panel opinion is unpersuasive is borne out by no less significant a fact than that the panel itself, as evidenced by the two separate concurrences today, cannot even now agree as to either the proper interpretation or defense of its opinion.

Additionally, beyond the opinion's unpersuasiveness, its refusal to rest decision on the proffer made by the President of the United States, and its insistence instead upon resting decision on a putative concession by the detainee, has yielded reasoning that all but eviscerates the President's Article II power to determine who are and who are not enemies of the United States during times of war.

Because of the facial unpersuasiveness of the court's opinion, and because the opinion of law that resolves the issue raised in this appeal is of even greater *358 constitutional importance than the result reached by that opinion, I would grant the requested rehearing *en banc*. I believe that the significance of the issue that has been presented calls for an opinion from this court that directly addresses that issue and resolves it unambiguously and convincingly (however broadly or narrowly), based upon the facts as they appear in the record and the arguments as they have been well made by the parties.

I.

On the central question presented in this case, it is evident that the panel found itself simply unwilling to allow petitioner Hamdi to challenge the facts supporting his designation by the Executive as an enemy combatant, under any standard of review urged by those who appeared on behalf of Hamdi. However, the panel was equally unwilling either to adopt the "some evidence" standard and accept as sufficient under that standard the facts offered by the government as justification for Hamdi's seizure or to hold that the Judiciary is without all authority to review the President's designation of an individual as an enemy combatant, as alternatively urged by the government. Faced with this decisional paralysis, the panel retreated to ground that not only neither party attempted to defend, but that is transparently indefensible--holding that Hamdi cannot challenge, and the court cannot question, the facts proffered by the government in support of Hamdi's particular seizure and detention as an enemy combatant, for the asserted reason that

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Hamdi has *conceded* that he was seized in a foreign combat zone.

A.

In resting its decision on this factually and legally untenable ground, the panel reneged on the promises it hastily made to the parties at the litigation's inception.

It promised the citizen seized by the government "meaningful judicial review" of his claim that he was not an enemy combatant, pointedly refusing to "embrac[e] a sweeping proposition--namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir.2002) ("*Hamdi II*"). But it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant.

One could hardly be faulted for wondering why, as the panel held, more is "unnecessary to a meaningful judicial review" of a challenge to an Executive's enemy combatant designation than a concession of seizure in a foreign combat zone. Under even an exceedingly deferential standard of review, such, though it is relevant to, would hardly seem dispositive of whether one has been legitimately classified as an enemy combatant. The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state. But surely we would not conclude that that journalist or tourist (who could be expected to readily admit to his seizure in the foreign combat zone) had received meaningful judicial review of his claim that he was not an enemy combatant, if that claim received no judicial scrutiny at all merely because he stipulated that he was seized in that foreign combat zone. It is undoubtedly *359 for these reasons that the Executive neither designated Hamdi an enemy combatant on the basis of his mere seizure in a foreign combat zone nor defends its designation in this court on such basis.

But as the panel disowned its promise to the detainee to provide him meaningful judicial review, so also did it disown its promise to the Executive to accord him the substantial deference to which he is constitutionally entitled for his wartime decisions as to who constitute enemies of the United States. The panel promised the Executive that the Judiciary would not sit in full review of his judgments as to who is an enemy combatant of the United States, but it adopted a rule that will henceforth do just that, cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee.

Upon a moment's reflection, it is apparent that the rule of law that was fashioned by the panel professedly in the name of deference to the Executive, and that now binds us, is, in application, a rule of no deference at all. For counsel must now be provided and judicial review had of the Executive's determination that one is an enemy combatant in every instance in which the petitioner but refrains from affirmative concession that he was seized in a foreign combat zone. The Executive's undeniably important interests in the prohibition of access to detained enemy combatants for reasons of national security and in the conduct of war free from fear that it will be summoned to court to answer to the Judiciary for its enemy designations, thus, are uncomfortably protected by little more than the hope (vain after the court's opinion, if not before) that the habeas petitioner will gratuitously or foolishly concede that his seizure occurred in a foreign zone of combat.

That the government's victory is but thinly guised defeat could not be better confirmed than by the arguments that have already been made in opposition to, and in support of, the panel's opinion by the parties to this dispute. Thus, those appearing on behalf of Hamdi argue, to no surprise and in compelling understatement, that the panel fundamentally erred for the reason that, "it cannot fairly be stated that it is 'undisputed' that Hamdi was captured within a zone of active combat operations in a foreign country" "[b]ecause Hamdi was denied the opportunity to meet with counsel, and was refused the opportunity to dispute the facts put forth by [the government]--including assertions as to where he was captured and what the circumstances were at the time." Appellee's Petition for Rehearing and Suggestion for Rehearing in Banc, at 12-13. The obvious remedy for this error being, they reasonably claim, a remand for further factual development on the issue, with allowance for participation by Hamdi himself.

And the government, as expected, rejoins that "the type of evidentiary proceeding that appellees seek would raise precisely the same problems concerning judicial oversight of military operations overseas that the panel properly concluded is not only unwise, but unauthorized under our constitutional scheme." Answer for Respondents-Appellants to Petition for Rehearing and Suggestion for Rehearing en Banc, at 11.

A more Pyrrhic victory would be hard to conceive.

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In sum, then, because of its unwillingness to confront head-on the admittedly difficult issue presented by this appeal, decide upon the standard of review required by the Constitution, and resolve the case by application of that standard to the facts proffered in justification for the Executive's ***360** designation of Hamdi as an enemy combatant of the United States, the panel succeeded in securing *neither* the guarantees of the Bill of Rights nor the powers committed to the Executive by Article II of the Constitution.

B.

These breaches perhaps could be excused if the panel had divined an unassailable narrower ground for decision than that foreshadowed by either of its bold promises. However, its decision cannot be excused on this basis, because the ground upon which the panel rested its decision is anything but unassailable. *For it simply is not "undisputed" that Hamdi was seized in a foreign combat zone.*

For its repeated assertions that this circumstance is conceded, *see* Hamdi v. Rumsfeld, 316 F.3d 450, 459, 461, 465, 473, 475, 476 (4th Cir.2003) ( "*Hamdi III*"), the panel relied solely on the petition filed by Hamdi's father as next friend. *See* id. at 460; id. at 461 (stating that the Mobbs affidavit "confirms the material factual allegations in Hamdi's petition"); id. at 474 ("Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution...."). As the panel wrote,

> [i]n this case, there are two allegations that are crucial to our analysis. *First, Hamdi's petition alleges that he was a resident of and seized in Afghanistan....* Second, the Government's response asserts that Hamdi is being detained pursuant to the Commander-in-Chief's Article II war powers and that the circumstances underlying Hamdi's detentions, as reflected primarily in the Mobbs declaration, establish that Hamdi's detention is lawful.

Id. at 471 (emphasis added). Thus, the panel opinion quite clearly rests on the petition alone for the court's conclusion that seizure in a combat zone was "undisputed."

But the next friend petition says no such thing as the panel held that it does. It states that, "[w]hen seized by the United States Government, Mr. Hamdi *resided* in Afghanistan." J.A. 9 (emphasis added). Of course, it is a *non sequitur* to conclude from the representation that Hamdi *resided* in Afghanistan at the time of his seizure, that he was also *seized* in a foreign zone of active combat. In the end, it is obvious that the panel simply missed the critical import of this distinction between residency on one hand, and seizure or capture on the other, even though it recognized--at least in passing--the distinction between the two. As it said, though incorrectly as to the latter, "Hamdi's petition alleges that he was a resident of *and* seized in Afghanistan...." *Hamdi III*, 316 F.3d at 471 (emphasis added).

Insistence that the distinction be drawn between acknowledgment of residency and concession of seizure in a combat zone is not to be clever. I have no reason to believe that Hamdi was not in a combat zone at the time of his seizure, and, to the extent relevant, I believe that he was. But, as a court of law, we cannot impute a concession of this circumstance of seizure from an innocuous acknowledgment of residency in a country in which combat was underway. Such is not credible.

No more so can other statements that appear in the next friend petition and relied upon by the panel be fairly taken as concession that Hamdi was actually seized in a foreign combat zone, as opposed to acknowledgment merely that he was a resident of a country in which there was ongoing combat at the time of seizure. The panel recites that,

> ***361** [a]ccording to the petition, "[i]n the course of the military campaign, and as part of their effort to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, a loosely-knit coalition of military groups opposed to the Taliban Government," and thereby "obtained access to individuals held by various factions of the Northern Alliance."

*Hamdi III*, 316 F.3d at 460. The panel apparently viewed the quoted petition passages similarly as conceding seizure in a foreign combat zone. But a careful reading of these passages reveals that neither is such a concession fairly inferable from them. Most obviously, neither passage says anything at all about *Hamdi*. But, additionally, even if they had, there is no reason to presume that every person who was held by the Northern Alliance (assuming, for the moment, that Hamdi falls within that class) was captured in Afghanistan during the course of combat operations. Of course, this may have been the case. But it also may not have been.

The final statement in the next friend petition that the panel quoted, and on which it seemingly relied, was at once materially abbreviated by the panel and materially supplemented. The materiality of both the omission and the addition is apparent when the actual quotation from the petition is read side-by-side with the panel's altered and paraphrased rendition of that quotation. The petition actually reads as follows:

> On information and belief, Mr. Hamdi was captured or transferred into the custody of the United States in the Fall of 2001.

J.A. 10. In its opinion, however, the panel relates the statement in this way:

> The petition further alleges that "Hamdi was captured or transferred into the custody of the United States in the Fall of 2001" *in Afghanistan*. ...

*Hamdi III*, 316 F.3d at 460 (emphasis added). Thus, terribly significantly given that the panel's opinion rests on the "undisputed" nature of the circumstance, the panel supplies a geographical location of seizure and detention that the statement in the petition just does not contain, imputing a representation as to this location to the next friend. And though it should not be necessary to put a finer point on it than this, even had the petition statement actually contained the geographical location of seizure and detention that the panel thought, the statement would not support the conclusion that the situs of seizure was conceded. For, even with this significant alteration, the statement would only admit that Hamdi was *either* "captured *or* transferred into custody," not necessarily one as opposed to the other.

In fact, upon reading the petition, it is actually apparent that it scrupulously avoids any admission as to the precise geographical point of seizure, likely because such was unknown to Hamdi's father, who filed the petition. *See* J.A. 11 (Petition: "On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X- Ray at the United States Naval Base in Guantanamo Bay, Cuba.... On or about January 11, 2002, the precise date unknown to Petitioners but known to Respondents, the United States military transferred Yaser Esam Hamdi to Camp X- Ray, Guantanamo Bay, where he was held until April 2002.").

Because the panel opinion relies *exclusively* upon the next friend petition for its conclusion that Hamdi was conceded to have been seized in a foreign combat zone, and because none of the statements in that petition either concede or can be fairly read to concede seizure in such a location, ***362** the panel's opinion, which in turn rests exclusively upon such a concession, is unconvincing.

C.

Sensing the vulnerability of the panel's opinion, the concurrences in the denial of rehearing *en banc* (Judges Wilkinson and Traxler) attempt to save the panel opinion by marshaling for the first time today additional support, beyond that relied upon by the panel, for the panel's conclusion that it has been conceded that Hamdi was seized in a foreign combat zone. Thus, for example, Judge Wilkinson maintains, "Hamdi's own *filings* make clear that he was seized in a zone of active combat operations," *ante* at 342 (emphasis added), by which he makes reference not only to the next friend petition upon which the panel solely relied, *see, e.g.*, *Hamdi III*, 316 F.3d at 460; id. at 461 (stating that the Mobbs Declaration "confirms the material factual allegations in Hamdi's petition"); id. at 471 ("Hamdi's petition alleges that he was a resident of and seized in Afghanistan ...."); id. at 474 ("Hamdi's petition places him squarely within the zone of active combat ...."), but also to the new materials cited by the government in its response to the petition for rehearing, in support of the court's conclusion that the location of seizure has been conceded. In particular, excepting a letter that is admittedly "outside the legal arena" and thus obviously irrelevant, Judge Wilkinson cites to Petitioner's Traverse and Response to Respondent's Motion to Dismiss filed in the district court and a statement by the district court. *Ante* at 342.

I have previously expressed my concern about the trend in our court to attempt "to add to, subtract from, or recharacterize the facts recited and relied upon in a challenged panel opinion, or even to fine-tune, if not fundamentally reshape, the legal analysis undertaken by the original panel, *in the course of opinions respecting the denial of rehearing en banc*." Jones v. Buchanan, 325 F.3d 520, 538-40 (4th Cir.2003) (Luttig, J., dissenting) (citing cases). Without repeating in full the reasons for this concern here, such attempted modifications are unfair to the litigants, because the parties (and the public) are bound by the panel opinion as it was written and issued, and they may obtain further review only of the issued panel opinion, without regard to modifications suggested by a concurrence in denial of *en banc* rehearing. In other words, they are bound by the only opinion of law in the case, not by the hypothetical opinion represented by the combination of the original panel opinion and purported modifications made during proceedings appealing for *en banc* reconsideration. This is not to say that explanatory concurrences in denials of rehearing *en banc* should never be written by the author of the challenged opinion or by judges who joined in that opinion; it is only to say that when such an opinion would add significant factual or legal support for the judgment reached, the appropriate course is for the panel to modify its opinion formally so as to supply the important new facts or reasoning in an opinion that then becomes the precedent for the court which may be appealed by the parties to the Supreme Court of the United States.

But putting this concern to one side, the very fact that the concurrences have felt need to offer up the additional support that they have is confirmation that the panel at least now senses the analytical softness of its opinion. There would otherwise be no reason to attempt to shore up that opinion with these additional materials, which the panel fully considered originally and rejected as not providing any ***363** support for its conclusion that the location of seizure was "undisputed."

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In any event, apart from their irrelevancy now as a matter of law given that they were not relied upon in the panel opinion, these additional materials, as the panel originally concluded, do not any more prove an affirmative concession that Hamdi was captured in a foreign combat zone, than do the statements contained in the petition filed by the next friend--even if, in combination with that sole filing relied upon by the panel, they render the case slightly closer.

Judge Wilkinson quotes from a traverse filed in the district court which reads that the petitioner's claim does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." J.A. 64. Much like the acknowledgment of Hamdi's place of residence, the observation that Hamdi's claim does not implicate his initial *detention* does not, and certainly should not in a court, say anything about where he was originally *seized*--at least not necessarily. As does the law, these parties themselves distinguish between seizure and detention throughout their submissions. If there were any doubt as to the inappropriateness of drawing such an irrebuttable inference as to place of seizure from place of detention in this instance, it should be put to rest by the fact that that very same traverse filing states that "[p]etitioner in no way concedes that Respondents' factual assertions are true." J.A. 65 n.1. Indeed, it even specifically states that "information about Petitioner Hamdi prior to his transfer to the custody of [the government] is based on the hearsay of unknown members of the Northern Alliance." *Id.* The other materials with which the concurrences now attempts to support the panel's opinion suffer from the same flaw, as they too speak only as to the place of detention, not the place of seizure.

Thus, neither the panel nor even the concurrences after the fact, adduce a single statement from Hamdi's petition or any other filing in this case in which there appears a concession that Hamdi was captured or seized in a foreign zone of active combat operations. A single example suffices to show the extent of the reach attempted by the panel. The concurrences now cite even to a defense counsel's single word of agreement with a statement made by the district court that Hamdi was "in a fighting situation." *Ante* at 342 n. 2 (citing Tr. of Aug. 13, 2002 district court proceedings). Not only is this single word of agreement with this statement made by the district court ambiguous on its face, it is followed by defense counsel's statement--omitted by the concurrences--that "what is the problem with all of that, of course, is that we have absolutely no detail with regard to the circumstances under which he was initially captured.... We don't know what happened." J.A. 394.

D.

But more important than the substantive content of any of these several oblique references marshaled by the concurrences in *en banc* denial is their source. These statements, however they are interpreted, are not from Hamdi or from counsel acting on his behalf. They are from Hamdi's father, acting as next friend, who, it has been represented to us, has not even had any contact with his son since the latter was seized over a year ago. As Judge Motz recognizes, even an unambiguous concession as to the location of Hamdi's seizure in such a third party submission cannot, as a legal matter, bind Hamdi to a fact that in turn is deemed dispositive of his claim for freedom.

In no sense, then, is the place of Hamdi's seizure "undisputed" by the parties to this suit. An opinion that rests exclusively ***364** on the premise of a stipulated agreement as to this circumstance of seizure, as does the panel's, is simply unconvincing. And it is rendered no more convincing, even if it is thought more palatable, by the fact that resting decision on this ground permits superficial distinguishment on fact (though not in principle) of the case in which a citizen seized on American soil is denominated an enemy combatant, *see* Hamdi III, 316 F.3d at 465 (citing and distinguishing *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y.2002)), which case the panel feared might unavoidably be reached by a decision on the issue as presented and under the facts as proffered.

E.

Judge Traxler writes extensively in defense of the panel opinion, although, beyond embracing the materials newly cited by Judge Wilkinson, he does little more than repeat at length the panel's reasoning (where needed, embroidering upon that opinion for himself), and quote liberally from this and Judge Motz's opinion. But the juxtaposition of the particular defenses that he chooses to make, with their obvious responses, all but confirms to the careful reader the shortcomings in the panel's opinion. It is undoubtedly for this reason that Judge Traxler's co-panelists, who, with him, jointly authored the original opinion, do not align themselves with him today.

1.

To begin with the most significant, Judge Traxler, though writing to bolster the panel's conclusion that the place of seizure in a foreign combat zone was in fact conceded in the next friend petition, actually ends up admitting that the petition itself does *not* explicitly concede seizure in such a zone. *See, e.g., ante* at 345-346 ("Judge Luttig correctly observes that the habeas petition does not *explicitly* state that 'Hamdi was captured in a zone of active combat in a foreign theater of conflict.' "); *id.* at 345 (stating that "the petition[ ] fail[s] to affirmatively state that Hamdi was captured in

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a foreign combat zone"). This is an admission of no small consequence, of course, for the panel relied entirely upon the existence of such a concession of capture in a foreign combat zone in the petition, and the opinion plainly regarded this concession as having been made explicitly and unequivocally. Certainly, until today, the reader would have never thought otherwise. Nowhere, for instance, is there even the slightest suggestion that the panel regarded this dispositive concession as merely "implicit." And there certainly is no mention of any inferential steps of which one would expect explanation before a dispositive concession is implied by a court.

By this candid admission alone, Judge Traxler has made out the case against the panel's opinion better than have either Judge Motz or myself. For if, as Judge Traxler says, this is a "momentous" case, then he has now confirmed that it was dismissed on the basis of a concession believed by the panel (though disputed by the parties) to have been made only "implicitly," and at that, by a third party to the action who not only had had no contact whatsoever with the petitioner himself, but who even disavowed that he could speak to the facts except upon information and belief.

Unwittingly compounding further the analytical problems that beset the panel's opinion as it is written, Judge Traxler next attempts to marshal for the first time support for what was the panel's assumed, but wholly unsupported, holding that a next friend may concede facts sufficient to conclude a litigation when the detainee is inaccessible to the next friend by reason of the ***365** respondent's own actions. All that need be said as to this effort is that, after now critically addressing himself as a single judge to the proposition that the panel originally uncritically assumed, Judge Traxler is able to cite only a single case and that of a district court almost forty years ago. *See ante* at 349 (citing Hall v. Hague, 34 F.R.D. 449 (D.Md.1964)). *And not even that case holds that a next friend may concede the facts that will lead to the dismissal of the plaintiff's suit in circumstances anywhere approaching those presented by this case.* Thus, on this score as well, has Judge Traxler made the case for dissent better than have either Judge Motz or myself.

Judge Wilkinson, to his credit, recognizes as much, and attempts to salvage the panel opinion on this critical point by asserting that "ordinary civil [and] criminal litigants" *cannot* be bound by next friend concessions, but that Hamdi *must be so bound*, for the reason that he allegedly was seized in a foreign zone of active combat operations. *See ante* at 342 n. 2. But in attempting the salvage, Judge Wilkinson himself comes very close (although he does not realize it) to outright conceding the indefensibility of the point, because the binding character of a next friend concession obviously does not turn upon whether the concession is or is not made on behalf of an individual allegedly seized abroad, or even an individual seized abroad in a foreign theater of battle. Nor does the separation of powers have anything to do with this necessary legal fact. And even if the binding character of a next friend concession somehow did turn upon the location of the petitioner's seizure, the principle would cut in precisely the opposite direction from that believed by Judge Wilkinson: the alleged concession might be binding upon one seized domestically with whom the next friend is in unfettered contact, but presumptively would never be binding upon one seized abroad and held incommunicado.

In tacit recognition that these belated arguments as to the fact of concession and the legal acceptability of third-party fact concessions ring hollow, Judge Traxler (notably speaking only for himself) suggests finally that the panel would have reached the same outcome in this case even had it not concluded that the place of seizure was undisputed. *See ante* at 355 ("Nor for that matter, did we even hold that the Mobbs Declaration would have been insufficient had the place of capture been in dispute in this case."). I do not know quite how to respond to this statement, because I am in no position to say that, irrespective of what the panel wrote, it would not have decided the case differently had it concluded that the location of seizure was disputed. All that I, the parties, and the public can do is reason inferentially from the opinion for the court, which the panel did write. And based upon that opinion, while Judge Traxler may now in hindsight characterize the supposed concession by Hamdi's next friend as insignificant, the panel opinion he co-authored treats it as anything but. The opinion well speaks for itself in rebuttal to this suggestion. Said the panel, in emphasized words that Judge Traxler would have us overlook today, the concession of seizure in a combat zone made in the petition is "crucial to our analysis." Hamdi III, 316 F.3d at 471.

Thus, while Judge Traxler may now want to say that the panel would decide the case no differently absent a concession, he is faced with self- contradiction to so maintain, given that the opinion he co-authored went out of its way to denominate as "crucial" to its analysis the concession that it mistakenly believed was made. The unavoidable inference to be drawn from such a characterization of fact dispositively ***366** relied upon is not, as Judge Traxler would now have it, that absent that fact, the disposition would still be the same, but rather, that the disposition reached on the strength of that fact quite likely would be different if the fact were otherwise.

2.

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Unable to shore up the foundation of the panel's opinion, that Hamdi's next friend conceded that Hamdi was seized in a zone of active combat operations and bound Hamdi to that fact, Judge Traxler attempts to shift the focus away from the panel's opinion and the ultimate legal issue entirely, by erecting and then attacking a series of straw man arguments he ascribes to this dissent. Thus, he suggests that I argue that the facts alleged in the petition should be taken as false, *ante* at 348-349, and that I am "attempt[ing] to rewrite the case history and the substance of the habeas claim." *ante* at 349. Of course, I make no such arguments. I make the simple point that the petition does not affirmatively concede capture in a foreign combat zone, a fact that Judge Traxler now admits, *see ante* at 346.

Judge Traxler next argues that I have unfairly stated that neither party has attempted to defend the significance of the place of capture, *ante* at 355- 356. Again, I make no such statement. What I have stated is that neither party assigned any legal significance to the argument relied on by the panel that the locus of capture was "undisputed." (And, given the record as I have recited it herein, it is unsurprising that they did not.) But to remove the source of my objection from all doubt, and as I explain more fully below, it is *not* the panel's reliance on the place of capture that troubles me. Rather, it is the panel's indefensible reliance on an assumed concession by the petitioner, as opposed to a proffer by the government, to establish this "fact."

In his final attempt to shift the focus to a criticism that I have not made, but to which response is easier, Judge Traxler asserts that I am criticizing the panel for issuing a narrow, as opposed to a broad, holding. *See ante* at 355. As I have quite clearly said, however, the panel's error in my view was not in its search for a narrower ground, but rather in the unpersuasiveness of the putatively narrower ground on which it ultimately relied--a concession by Hamdi as to the place of his seizure. Not only is this narrower ground of concession factually unpersuasive, it is also unpersuasive as a matter of law, for the reasons Judge Motz and I have set forth.

3.

When all is said and done, then, Judge Traxler's writing today both confirms the vulnerabilities inherent in the panel's opinion he seeks to defend and puts the lie to the panel's assertion that, by grounding its decision on the reputed concession by Hamdi's next friend, it *both* provided Hamdi meaningful judicial review *and* protected the President's Article II powers to determine who and who are not enemies of the United States.

As to the former, not only does he admit that there is no such explicit concession as the panel believed, but he is forced as well to acknowledge that there is not even legal support for the panel's unexamined supposition that a next friend can actually concede a dispositive fact without even the petitioner's knowledge. As to the latter, his analytical admissions betray well that Hamdi was not provided the meaningful judicial review that he was promised. And, through his attempt to discount the importance of the supposed concession to the panel's disposition, he only draws attention ***367** to the pivotal importance of that supposed concession and thereby to the trifling deference the panel accorded the President of the United States in his determinations of who constitute enemies of our Country. A more forceful explanation of the grounds for dissent I could not make.

II.

Because of the overarching importance of the opinion of law that resolves the issue presented by this appeal, because of the panel opinion's dismissiveness of the substantial interests at stake in this case for both citizen and government, and because of the analytical vulnerability of the court's opinion as it stands, I believe that both the United States and the petitioner would be served by reconsideration by our full court.

Upon reconsideration, we should decide the critical issue of the appropriate standard that is to govern the Judiciary's review of an individual's challenge to an Executive designation of enemy combatant status, the indecision of which by the panel I believe fails to serve the substantial interests of not only the parties but also the public in the resolution of this issue. Having decided the governing standard, we should decide the issue of whether that standard has been satisfied in this case by the government's proffer of the facts contained in the Michael H. Mobbs affidavit, the like indecision of which by the panel also, I believe, fails to serve the parties and the public.

III.

Although I reserve ultimate judgment because of the difficulty of the issue and because I write in dissent from the request to rehear the case and therefore without the benefit of argument, I believe, as to the standard of review, that the government may be correct that

> [p]roper respect for separation of powers and the limited role and capabilities of courts in matters of national security may well limit the courts to the consideration of legal attacks on detention of the type considered in [*Ex parte*] *Quirin*[, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942)] and [*In re*] *Territo*, [156 F.2d 142 (9th Cir.1946),] and raised by the petition in this case. At most, however[ ] ... a court's proper role in a habeas proceeding such as this would be to confirm that there is a factual basis supporting the military's determination that a detainee is indeed an enemy combatant.

Br. of Respondents-Appellants at 28 (internal citation omitted); *see also id.* at 36 ("[T]o prevail under a constitutionally appropriate standard, the government would at most need to provide some factual basis for supporting the military's determination that Hamdi is an enemy combatant."). That is, I believe that the President of the United States may well be entitled under the Constitution to receive from the Judiciary the deference afforded by a standard selected from those along this continuum, when, in exercise of the powers conferred upon him by Article II of the Constitution, he designates a person as an enemy combatant against this Nation.

As to the application of the standard to the facts proffered by the government in support of the Executive's designation of Hamdi as an enemy combatant, I reserve ultimate judgment for the same reasons. I am prepared to say, however, that I would likely conclude, as argued by the United States, that the facts recited in Special Advisor Mobbs' affidavit, as to which there is not even hint of fabrication, are sufficient to satisfy the constitutionally appropriate standard for the President's ***368** designation of an enemy of the United States.

This affidavit states that Hamdi traveled to Afghanistan in the summer of 2001, where he promptly affiliated with a Taliban military unit and received weapons training. It further states that during a battle between the Taliban and the Northern Alliance later that year, Hamdi's Taliban unit surrendered to Northern Alliance forces. It continues that Hamdi was directed to surrender his Kalishnikov assault rifle (*i.e.*, AK-47) to Northern Alliance forces and was subsequently imprisoned. The affidavit represents that, while in prison, Hamdi was determined by the United States military screening team to meet the criteria for enemy combatants over whom the United States was taking control. And finally, the affidavit relates that in January 2002, a Detainee Review and Screening Team established by the Commander of the United States Central Command reviewed Hamdi's record and determined again that he met the criteria established by the Secretary of Defense for individuals over whom United States forces should take control and transfer to Guantanamo Bay.

In addition to these declarations made under penalty of perjury by the appointed representative of the government, the President of the United States, through his Solicitor General, has represented to this court that in his judgment Hamdi is indeed an enemy combatant, detention of whom is warranted in the interests of national security.

The panel's contrary holding notwithstanding, I suspect that more than this would be unnecessary to affirm the President's decision to designate Hamdi an enemy of the United States.

In all events, I believe that it is the obligation of this court to decide these issues that have been presented to us by the United States and by one of its citizens. At times, judicial avoidance of the difficult and the politically charged is the more prudent and the more faithful to the judicial role, both. This is a case in which it is neither.

* * * * * * * * * * *

For the reasons set forth, I would grant the suggestion for rehearing *en banc*. Accordingly, I respectfully dissent from the court's denial of that suggestion.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from denial of rehearing en banc:

For more than a year, a United States citizen, Yaser Esam Hamdi, has been labeled an enemy combatant and held in solitary confinement in a Norfolk, Virginia naval brig. He has not been charged with a crime, let alone convicted of one. The Executive will not state when, if ever, he will be released. Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate in any way with the outside world.

Precedent dictates that we must tolerate some abrogation of constitutional rights if Hamdi is, in fact, an enemy combatant. However, a panel of this court has held that a short hearsay declaration by Mr. Michael Mobbs--an unelected, otherwise unknown, government "advisor,"--"standing alone" (subject to no challenge by Hamdi or court-ordered verification) is "sufficient as a matter of law to allow meaningful judicial review" and approval of the Executive's designation of Hamdi as an enemy combatant. *See* *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir.2003). I cannot agree.

To justify forfeiture of a citizen's constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding to the contrary, ***369** the panel allows appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed all citizens. With respect, I believe the panel has seriously erred, and I dissent from the court's refusal to rehear this case *en banc*.

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I.

The panel's decision marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanction this holding.

The rights provided in the Constitution to each American citizen include the right to due process of law and to petition for a writ of habeas corpus. U.S. Const. amend. V; art. I, § 9. Unquestionably, the availability of habeas relief extends to detention pursuant to the Executive's military authority. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21, 18 L.Ed. 281 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304, 66 S.Ct. 606, 90 L.Ed. 688 (1946). Just as clearly, the responsibility for ensuring that individuals detained by the Executive receive the due process guarantees of the Constitution, including the right to petition for habeas corpus, rests with the courts. *See In re Yamashita*, 327 U.S. 1, 9, 66 S.Ct. 340, 90 L.Ed. 499 (1946). As the Supreme Court has explained, "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," *Sterling v. Constantin*, 287 U.S. 378, 401, 53 S.Ct. 190, 77 L.Ed. 375 (1932); *see Duncan*, 327 U.S. at 322-23, 66 S.Ct. 606; and the "government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391, 402, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), *overruled on other grounds, Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

The panel acknowledges as much, conceding that "[t]he duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict" and that "detention of United States citizens must be subject to judicial review." *Hamdi*, 316 F.3d at 464. Further, the panel recognizes that Hamdi, "an American citizen currently detained on American soil," is entitled to petition for a writ of habeas corpus and that habeas proceedings "naturally contemplate[ ] the prospect of factual development." *Id.* at 470, 473. The panel even recognizes the inadequacy of the sole "evidence" the Executive has proffered to support its enemy combatant designation of Hamdi-- the Mobbs declaration--for it admits that "a capable attorney could challenge the hearsay nature of the Mobbs declaration and probe each and every paragraph for incompleteness or inconsistency." *Id.* at 473. Yet, the panel concludes that "no ... factual inquiry on our part is necessary or proper" and that "Hamdi is not entitled to challenge the facts presented ... the Mobbs declaration." *Id.* at 473, 476.

The panel suggests that this conclusion accords with precedent. *See id.* at 475 ("this same issue arose in *Quirin* ... the *Quirin* principle applies here"). In fact the Supreme Court has *never* held that a person designated by the Executive as an enemy combatant cannot challenge that designation or that a court cannot require the Executive to substantiate it. In the case on which the majority relies, *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942), the Court did hold that for ***370** a violation of the laws of war, even an American citizen could be treated as an "enemy combatant" and held without the full array of Constitutional rights, but only because *the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.*

Thus, in *Quirin*, a German-born soldier, who claimed to be an American citizen, stipulated that after receiving payment by the German government and instruction by the "German High Command to destroy war industries and war facilities in the United States," he and six other German soldiers secretly landed in the United States during World War II with "a supply of explosives." *Id.* at 20-21, 63 S.Ct. 2. Only after finding that these "conceded facts" demonstrated "plainly" that the soldiers were within the "boundaries of the jurisdiction of military tribunals," did the Supreme Court reject their contention that they could not be tried by a military commission. *Id.* at 46, 63 S.Ct. 2. Critical to the case at hand, the Court first expressly rejected the Executive's argument that the soldiers, "must be denied access to the courts because they are enemy aliens who have entered our territory." *Id.* at 24-25, 63 S.Ct. 2. Instead, each of the soldiers was permitted, with the assistance of counsel, to file his *own* (not a next friend) petition for a writ of habeas corpus, which the courts reviewed to ensure that each soldier was in fact an enemy combatant. *Id.*

None of the few other Supreme Court cases addressing the rights of enemy combatants involved American citizens. But even when dealing with the claims of German and Japanese citizens detained by military authorities outside the United States during World War II, the Court has never suggested that an enemy combatant is without recourse to challenge that designation in court. On the contrary, the Court has held that a resident alien--who, the Court specifically noted, has far less status than those, like Hamdi, who enjoy the "high privilege" of citizenship--*can* challenge the Executive's designation of him as an enemy. *Johnson v. Eisentrager*, 339 U.S. 763, 770, 775, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (internal quotation marks and citation omitted). As the Court explained: "*Courts will entertain his plea* for freedom

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from Executive custody only *to ascertain* the existence of a state of war and *whether he is an alien enemy*." *Id.* at 775, 70 S.Ct. 936 (emphasis added); *see also id.* at 784-85, 70 S.Ct. 936; *Ludecke v. Watkins*, 335 U.S. 160, 171 n. 17, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948) (noting that "whether the person restrained is in fact an alien enemy ... may also be reviewed by the courts"); *Yamashita*, 327 U.S. at 8, 66 S.Ct. 340 (noting that "[t]he courts may inquire whether the detention complained of is within the authority of those detaining the petitioner" and "the Executive branch of the government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power" to inquire whether the "Constitution or laws of the United States withhold authority" from a military tribunal).

Moreover, the Supreme Court has upheld the Executive's designation of a person as an enemy alien or enemy combatant only when presented with *facts* supporting this designation--facts stipulated by the petitioner with the advice of counsel, as in *Quirin*, or facts proved by the prosecution at a military trial in which the petitioner was afforded counsel, as in *Yamashita*. In the case at hand, no facts have been presented to support the Executive's designation. The Executive has not permitted Hamdi to consult with counsel or challenge the allegations contained in the Mobbs declaration. And Hamdi has certainly not stipulated to anything. Denied the most basic procedural protections, Hamdi could ***371** not possibly mount a challenge to the Executive's designation of him as an enemy combatant. Yet in *Eisentrager*, *Ludecke*, and *Yamashita* the Supreme Court has explained that even aliens are entitled to precisely this right. Thus, far from supporting the panel's position, controlling precedent prohibits its approach.

II.

Without any acknowledgment of its break with precedent, the panel embarks on a perilous new course--approving the Executive's designation of enemy combatant status not on the basis of facts stipulated or proven, but solely on the basis of an unknown Executive advisor's declaration, which the panel itself concedes is subject to challenge as "incomplete[ ]" and "incorrect[t]" hearsay. *Hamdi*, 316 F.3d at 473. My good colleagues' opinion, although well-intentioned and replete with compelling declarations of separation-of-powers principles with which no one would quarrel, utterly fails to set forth an adequate rationale for its breathtaking holding.

Indeed, the panel offers only a single justification for its unprecedented decision to permit the Executive to support its designation of Hamdi as an enemy combatant with pure hearsay: Hamdi's capture in a "zone of active combat" was assertedly "undisputed." *See Hamdi*, 316 F.3d at 459 ("*Because it is undisputed* that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold the submitted declaration is ... sufficient." (emphasis added)); *id.* at 476 ("Hamdi is not entitled to challenge the facts presented in the Mobbs declaration," because he "has been designated an enemy combatant and *it is undisputed* that he was captured in a zone of active combat operations abroad." (emphasis added)). According to the panel, this apparently all-important fact is "undisputed" because "Hamdi's petition places him squarely within the zone of active combat." *Id.* at 474; *see also id.* at 460-61.

This is a thin reed on which to rest abrogation of constitutional rights, and one that collapses entirely upon examination. For Hamdi has never been given the opportunity to dispute any facts. The "facts" as to the place of Hamdi's "capture" could only be "undisputed" by reliance on a facially innocuous statement in a petition filed by Hamdi's father, as his "next friend." Thus, the panel determines that a petition filed by a next friend on behalf of, but without access to or consultation with, the petitioner constitutes a binding admission by the petitioner that results in the forfeiture of the petitioner's constitutional rights. This holding flatly contravenes venerable Supreme Court precedent. The Court long ago held that "a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of" the represented party. *Kingsbury v. Buckner*, 134 U.S. 650, 680, 10 S.Ct. 638, 33 L.Ed. 1047 (1890); *see also White v. Miller*, 158 U.S. 128, 146, 15 S.Ct. 788, 39 L.Ed. 921 (1895) (same); *Stolte v. Larkin*, 110 F.2d 226, 233 (8th Cir.1940) (collecting cases). [FN1]

FN1. Judge Wilkinson contends in his concurrence to the order denying rehearing *en banc* that these cases do not apply to Hamdi because he is an enemy combatant who is not entitled to rights "enjoyed by ordinary civil or criminal litigants." *See ante* at 342 n. 2. This reasoning is dizzyingly circular. The panel relied heavily on an admission of Hamdi's next friend (who had no opportunity to consult with Hamdi) to find Hamdi an enemy combatant. Now, Judge Wilkinson maintains that *because* Hamdi is an enemy combatant, *White* and *Kingsbury* do not apply, and Hamdi is bound by his next friend's assertedly critical admission. *Id.* Thus, Judge Wilkinson seeks to use the panel's conclusion (that Hamdi is an enemy combatant) to justify the panel's improper reliance on an admission of Hamdi's next friend, which provides the very basis for that conclusion. In sum, according to Judge

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Wilkinson, because Hamdi's next friend made a purportedly devastating admission, Hamdi forfeits all rights to challenge that admission, and ultimately all constitutional rights. Surely this does not constitute the "meaningful judicial review" that the panel promised. *See* Hamdi, 316 F.3d at 462, 473.

Nor does the district court opinion, Hall v. Hague, 34 F.R.D. 449 (D.Md.1964), relied on by Judge Traxler in his concurrence, *ante* at 350, offer support for the panel's startling approach. In Hall, a district judge merely determined that the guardian *ad litem* of a minor could admit certain housekeeping matters prior to trial, on the understanding that "[a] *t the trial*, the judge will be able to tell if any unjustified admissions have been made and take appropriate action." Id. at 449-50 (internal quotation marks and citation omitted) (emphasis added). This is a long way from holding, as the panel does (ignoring Kingsbury and White), that a statement in a petition filed by Hamdi's next friend constitutes an admission by Hamdi providing the basis for denial of his constitutional rights and indefinite imprisonment, *without the benefit of any trial*. Indeed, Judge Traxler's assertion that "there is no reason to believe that [Hamdi's] rights are being bargained away or that a factual mistake is being made," in the next friend petition, *ante* at 349 n. 7, ignores the obvious. How could there be any "reason to believe that rights are being bargained away or that a factual mistake is being made" when the only person who could offer such a reason or contest a factual mistake--Yaser Esam Hamdi--has never been given the chance to do so? By keeping Hamdi imprisoned incommunicado, the Executive has denied him this opportunity. Thus, we simply have no idea whether his "rights are being bargained away" or "a factual mistake is being made." It is precisely to avoid resolving an individual's fate on such uncertain grounds that the Supreme Court has held that a next friend petition "cannot be excepted to for insufficiency, nor can any admission ... be binding." White, 158 U.S. at 146, 15 S.Ct. 788.

***372** Just as importantly, even if the statement in his father's petition that "[w]hen seized," Hamdi "resided in Afghanistan," J.A. 9, somehow translated into Hamdi's admission that he was captured "in a zone of active combat," Hamdi, 316 F.3d at 459, this should not render the Executive's designation of enemy combatant status irrebuttable. The ramifications of such a holding are chilling. Pursuant to the panel's decision, for example, any of the "embedded" American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, [FN2] could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an "enemy combatant." Indeed, under the panel's holding, any American citizen seized in a part of the world where American troops are present--*e.g.*, the former Yugoslavia, the Philippines, or Korea--could be imprisoned indefinitely without being charged with a crime or afforded legal counsel, if the Executive asserted that the area was a zone of active combat. [FN3] Thus, the only basis for relying on a hearsay declaration to approve ***373** the Executive's designation of Hamdi as an enemy combatant, *i.e.*, Hamdi's assertedly "undisputed capture[ ] in a zone of active combat," is in truth a chimera and certainly provides no justification for the panel's extraordinary holding.

FN2. I note that in a letter to Senator Patrick Leahy, contained in the record, but ignored by the panel, Hamdi's father, in fact, states that his son went to Afghanistan less than two months before September 11, 2001 to do "relief work," was "trapped in Afghanistan once that military campaign began," could not have received military training, and was never an enemy combatant. J.A. 153-54.

FN3. I find puzzling the contention that the panel opinion "does not speak to the issue of whether an 'enemy combatant' may challenge the government's claim that the former Yugoslavia, the Philippines, or Korea is a zone of active military operations," *ante* at 354-355. First, no basis is provided for distinguishing between the "troops ... still on the ground in Afghanistan," Hamdi, 316 F.3d at 476, and American troops "on the ground" in the former Yugoslavia, the Philippines, or Korea. Moreover, in suggesting that a person detained in one of those countries might be able to challenge the Executive's designation of that country as a zone of active military operations, the concurrence necessarily implies that the question of what constitutes such a zone is justiciable--a conclusion seemingly at odds not only with the panel opinion, *see* 316 F.3d at 476 (dismissing Hamdi's contention that hostilities in Afghanistan had ended), but also with the concurrence itself. *See ante* at 351-352 n. 9.

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Nor, as the panel implicitly acknowledges, does the two-page, nine paragraph Mobbs declaration by itself, provide such justification. The panel's assessment of the Mobbs declaration is entirely accurate: that declaration could indeed be easily and successfully "challenge[d]" as "hearsay," and "probe [d]" for "incompleteness or inconsistency." Hamdi, 316 F.3d at 473. [FN4] The declaration contains no indicia of reliability except for Mr. Mobbs' oath--which seems of minimal value given that Mr. Mobbs does not claim *any* personal knowledge of the facts surrounding Hamdi's capture and incarceration. Rather Mr. Mobbs states that his "familiar[ity]" with "the facts and circumstances" surrounding Hamdi's capture, is "[b]ased upon" his review of undisclosed and unenumerated "relevant records and reports." J.A. 61. In fact, Mr. Mobbs himself did not (perhaps could not) make the determination that Hamdi is an "enemy combatant." Instead, Mr. Mobbs can merely declare that, according to "records and reports," "Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants." J.A. 62. The Mobbs declaration does not even state what, if any, evidence this "U.S. military screening team" relied on in making that determination or whether Mr. Mobbs himself conducted any independent review of this evidence. Indeed, the declaration's statement that Northern Alliance troops initially captured Hamdi suggests that even the U.S. military does not have any first-hand knowledge of Hamdi's conduct or status in Afghanistan.

FN4. The panel twice details the statements made in the Mobbs declaration, Hamdi, 316 F.3d at 461 and 472, and the Executive forcefully contends that the declaration meets the "some evidence" standard, but the panel carefully refrains from so holding. Id. at 474.

In sum, the record provides no credible evidence supporting the Executive's designation of Hamdi as an enemy combatant. Accordingly, a court has no basis upon which to perform its constitutional duty " 'to examine' " the " 'validity' " of the " 'reason' " for Hamdi's " 'commitment.' " *See* Ex parte Merryman, 17 F.Cas. 144, 150 (C.C.Md.1861) (noting " 'the absolute necessity of expressing upon every commitment the reason for which it is made, [and] that the court, upon a habeas corpus, may examine into its validity' " (quoting 3 Blackstone, Commentaries 133, 134)). Thus, although the panel steadfastly maintains that it engages in a "meaningful judicial review," *see* Hamdi, 316 F.3d at 462, 473, its rubberstamp of the Executive's unsupported designation lacks both the procedural and substantive content of such review. [FN5]

FN5. Moreover, while I applaud the panel's attempt to confine its holding to the facts at hand, without effect on the rights of citizens captured on American territory, *see* Hamdi, 316 F.3d at 465, similar attempts to constrain judicial holdings have proved unavailing. As Justice Jackson recounted, despite the Supreme Court's careful efforts to limit the scope of its holding in Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), to the specific facts of that case, *see* id. at 101-02, 105, 63 S.Ct. 1375, the Court later determined that *Hirabayashi* dictated the holding in Korematsu v. United States, 323 U.S. 214, 218, 65 S.Ct. 193, 89 L.Ed. 194 (1944). *See* id. at 247, 65 S.Ct. 193 (Jackson, J., dissenting) ("The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding."). I fear that the panel may also have opened the door to the indefinite detention, without access to a lawyer or the courts, of any American citizen, even one captured on American soil, who the Executive designates an "enemy combatant," as long as the Executive asserts that the area in which the citizen was detained was an "active combat zone," and the detainee, deprived of access to courts and counsel, cannot dispute this fact.

***374** At the same time, I hasten to note that the total inadequacy of the Executive's proffer and the panel's review here does not provide license for a searching judicial inquiry into the factual circumstances of every detainee's capture, or require compliance with a production order as demanding as that called for by the district court. [FN6] Such an approach could hamper the Executive's ability to wage war, as the panel explains at length. *See* Hamdi, 316 F.3d at 469-473. But the possibility, no matter how real, that an improperly conducted judicial inquiry could impair the Executive's ability to wage war cannot, as the panel seems to believe, provide a justification for holding that the Executive can indefinitely detain an American citizen (even one captured in a zone of active hostilities) without producing any credible evidence that the citizen is an "enemy combatant." The Constitution gives Congress, not the Executive and not the courts, the power to suspend the writ of habeas corpus when the public safety requires it. U.S. Const. art. I, § 9. Absent a suspension of the writ, the Constitution demands that we strike the proper balance between ensuring the Executive's ability to wage war effectively *and* protecting the individual rights guaranteed to all American citizens. *See* Yamashita, 327 U.S. at 8, 66 S.Ct. 340. Without such a balance,

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our system of ordered liberty will indeed ring hollow.

FN6. Although I agree with the panel that the district court's production order required too much, the experienced district judge should be commended nonetheless. For, during wartime and in the face of opposition by representatives of a President enjoying record popular support, the district judge has courageously attempted to provide the meaningful judicial review that the Constitution mandates, however unpopular the case.

Thus, in contrast to the panel's holding, which effectively transforms the asserted "fact" of being captured in a zone of active hostilities into an *irrebuttable* presumption of "enemy combatant" status, [FN7] a court could regard such a "fact" as creating a *rebuttable* presumption, thereby shifting the burden to Hamdi (and others like him) to establish that he was *not* an "enemy combatant." The burden of persuasion would then be on Hamdi, with the aid of counsel, to proffer affirmative evidence of his "non-combatant" status. This would seem to be the course dictated by precedent.

FN7. Notwithstanding Judge Traxler's contention, nineteenth and early twentieth century takings cases do not support the panel's *de facto* creation of this irrebuttable presumption to justify Hamdi's indefinite imprisonment. *Cf. ante* at 351. Those cases, upholding the wartime destruction or seizure without compensation of *property* outside the United States, including property owned by U.S. citizens, do broadly note that "[i]n war, all residents of [an] enemy country are enemies." *Lamar v. Browne*, 92 U.S. 187, 194, 23 L.Ed. 650 (1875). But *no liberty* rights of U.S. citizens were at issue in any of those cases or their progeny. *See, e.g., Juragua Iron Co. v. United States*, 212 U.S. 297, 305-306, 29 S.Ct. 385, 53 L.Ed. 520 (1909); *Lamar*, 92 U.S. at 194. Indeed, the Supreme Court has never held that an American citizen becomes an "enemy" and can be deprived of his liberty rights solely by virtue of residing in an enemy country during wartime.

Alternatively, if the Executive produced the "relevant records and reports" on *375 which Mr. Mobbs relied in making his declaration, a court might be able to assure itself of the legitimacy of the Executive's designation. (Of course, the possibility that the "relevant records" pertaining to Hamdi's detention might contain *no evidence* that he was an "enemy combatant" is precisely the reason why judicial review is necessary.) The Department of Defense has obviously already compiled and collected these records. Producing them for judicial review, *ex parte* and *in camera* if necessary, would not in any way hamper the Executive's ability to wage war. Indeed, the Executive has apparently already made similar productions in other cases. *See Padilla v. Bush*, 233 F.Supp.2d 564, 608 (S.D.N.Y.2002); *United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va.2002). Such evidence might suffice to substantiate the Executive's designation. [FN8]

FN8. In *Padilla*, now certified for interlocutory appeal to the Second Circuit, the district court ruled that it would apply the "some evidence" standard suggested by the Executive, once Padilla--with the assistance of counsel--"presents any facts he may wish to present to the court" regarding his designation as an enemy combatant. *Padilla*, 233 F.Supp.2d at 608, 610; *Padilla v. Rumsfeld*, 256 F.Supp.2d 218 (S.D.N.Y.2003) (granting government's motion to certify orders in case for interlocutory appeal).

But in all events, the Executive must offer more than hearsay to support that designation; and so in answer to the question certified to us-- "[w]hether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yasser Esam Hamdi's classification as an enemy combatant?"--the answer must be, "No."

III.

In conclusion, I must note that I have no doubt that, in this time of great challenge for our Nation, the Executive has acted in good faith when designating Hamdi an enemy combatant. Under our Constitution, however, it is the responsibility of the courts to ensure that American citizens are not deprived of liberty without due process of law, regardless of the personal belief of any individual judge concerning the integrity of the Executive. As the Framers well understood, the Executive branch must be subjected to checks on its power if individual liberties are to be preserved. *See Duncan*, 327 U.S. at 322-23, 66 S.Ct. 606; *see also United States v. Robel*, 389 U.S. 258, 264, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967).

But one need not refer back to the time of the Framers

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to understand that courts must ... vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu*, a case in which the Supreme Court sanctioned the military internment of thousands of American citizens of Japanese ancestry during World War II. *See* 323 U.S. at 219, 65 S.Ct. 193. In its deference to an Executive report that, like the Mobbs declaration, was filed by a member of the Executive associated with the military and which purported to explain the Executive's actions, the Court upheld the Executive's conviction of Korematsu for simply remaining in his home, in violation of the military internment order. *See id.* at 215-16, 65 S.Ct. 193.

Of course, history has long since rejected the *Korematsu* holding. Indeed, Congress itself has specifically repudiated *Korematsu*, recognizing that "a grave injustice was done to" those "of Japanese ancestry by th[e] actions ... carried out without adequate security reasons and ... motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 App. U.S.C.A. § 1989a(a) (West 1990). But in truth, here, as in *Korematsu*, the Executive has failed to *376 proffer any real evidence to justify its action. When presented with no basis for reviewing the Executive's designation that an American citizen is an enemy combatant, other than the assurance of a Defense Department "advisor" that someone in the United States military made this determination, a court must demand more. *Cf. Korematsu*, 323 U.S. at 245, 65 S.Ct. 193 (Jackson, J., dissenting) ("So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination.").

The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and "more subtle blow to liberty." *Id.* at 245-46, 65 S.Ct. 193 (Jackson, J., dissenting). For although the incommunicado imprisonment of Hamdi will hopefully terminate some day, the panel opinion rationalizing this imprisonment will live on. As Justice Jackson warned, when the Executive "overstep[s] the bounds of constitutionality, ... it is an incident," but when a court "review[s] and approve[s], that passing incident becomes the doctrine." *Id.* at 246, 65 S.Ct. 193.

Courts have no higher duty than protection of the individual freedoms guaranteed by our Constitution. This is especially true in time of war, when our carefully crafted system of checks and balances must accommodate the vital needs of national security while guarding the liberties the Constitution promises all citizens. *See id.* at 234, 65 S.Ct. 193 (Murphy, J., dissenting) ("Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."). I believe that our court has failed in this case to carry out this most important responsibility. I would require a greater showing from the Executive before I would permit an American citizen, held in the United States, to be imprisoned indefinitely, without ever being afforded the opportunity to appear in court, contest the allegations against him, or consult with a lawyer.

It is for all of these reasons that I respectfully dissent from the court's denial of rehearing *en banc*. [FN9]

FN9. Contrary to Judge Wilkinson's suggestion in his concurrence, I do not question that Articles I and II delegate decisions as to the conduct of war and national defense to the Executive and Legislative branches of our government, and that we owe deference to those decisions. But deference to the political branches does not compel the Judiciary to abdicate its own duty to protect the individual liberties guaranteed all citizens. My disagreement with the panel decision is that Hamdi has not received the meaningful judicial review to which the panel acknowledges he is entitled. Such review is possible only if the Executive is required to substantiate its contentions that Hamdi is an enemy combatant with more than a declaration that the panel concedes is hearsay, inconsistent and incomplete. Even in the darkest days of World War II, after the devastating attack on Pearl Harbor, the Supreme Court recognized a greater role for the courts in safeguarding individual liberties than the panel now provides Hamdi. *See, e.g., Quirin*, 317 U.S. at 46, 63 S.Ct. 2. After all, "[i]mplicit in the term 'national defense' is the notion of defending those values and ideals which set the Nation apart." *Robel*, 389 U.S. at 264, 88 S.Ct. 419. I regret that in the name of deference to the political branches' preeminence in matters of war, the panel permits the subversion of the very liberties that make defense of this Country worthwhile.

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